The Central Law Journal.

SAINT LOUIS, AUGUST 24, 1877.

CURRENT TOPICS.

WILLIAM DOWNIE STEWART, Esq., a barrister of the Supreme Court of New Zealand, traveled through the United States (we believe) in the year 1875; and, on his return home, delivered a lecture to a society of law students, in which he instituted many instructive comparisons between the laws of America, England, Scotland, and his wnn country. Considering the fact that this gentleman lives literally on the other side of the world from us, and that his observations of our laws and institutions were necessarily hasty, his paper exhibits extremely few inaccuracies of statement. How the perusal of such a paper dissipates the dreams of our boyhood! How vividly it calls to our minds the fact that in a country the most remote from us on the globe—the *Terra Australis Incognita*, which, in our youth, we were accustomed to associate only with the idea of tatooed savages—a great empire is in process of growth; for there, in the most fertile of soils, the greatest of men have planted the greatest of languages and the greatest of laws. The gentleman named has kindly given us permission to republish his address in this journal, and we print a portion of it this week.

THE value of stenography, in taking depositions, especially in cases where it is desirable to overhaul a fraudulent bankrupt or an unwilling witness, is getting to be so well understood, that the old long-hand method is going rapidly out of use. The following interesting decision of Mr. District Judge Blatchford, which we find in the New York *World*, indicates a sensible disposition on the part of the courts to mould the law according to the march of improvement: "At an examination before Register Ketchum, in the matter of the bankruptcy of Dan'l Frey, Isidor Frey and Jacob L. Haas, counsel for the assignee, proceeded to take down the examination by a stenographer, whereupon counsel for the bankrupts objected to the proceeding, unless counsel for the assignee would supply him with a copy gratis, on the ground that the register is obliged to have the depositions taken in common writing, so that counsel might see clearly the questions and answers in order to conduct a cross-examination. The register overruled the objection, holding that the art of swift writing was too valuable to be parted with, and that the question presented was substantially whether any party may, at his will, forbid stenography upon the trial and compel common writing. Counsel for the bankrupts objected to the question of the register, and the question was certified to the United States District Court. Judge Blatchford concurred in the opinion of the register." There is, however, one serious drawback to stenography, as many of our groaning judges know to their cost. It is a fearful promoter of *longwindedness*. When one contemplates the interminable records and arguments, by a singular misnomer styled *briefs*, which are now sent up to our appellate courts, he almost wishes the lawyers were compelled to write with a stick on paper which costs a dollar a sheet. Then we would get back to Roman brevity.

MR. ISAAC M. CATE, the man whose mendacious industry instigated the late newspaper attacks upon Judge Dillon, has again come out in a printed letter addressed to the editor of this journal, under the name of *Seymour P. Thorndike*. It is said that in France, when one man wishes to assert his superiority over another in a quiet way, he does it by mispronouncing the latter's name. But when this is done to a person whose name is familiar and well known, the thing becomes pointless and silly. If we were to address a printed letter to the author of this letter, under the name of *Isaac L. Caitiff*, the supposed slip of the pen would be not less impudent, but more to the point. The former circular issued by this man, together with the statements of the facts which it called forth, convicted him of being destitute of veracity; this screed will equally overturn his reputation for good sense. The whole thing is weak and pointless—"saft," as they say up in the Alleghanies. It is a complete back-down, so far as Judge Dillon is concerned. He shies off from him, and drives his pointless spear against Judge Grant. His letter, while abounding in misstatements of fact, does not deny Judge Grant's statements in any material respect. It carries the idea that the bondholders all withdrew their opposition to Pickering; whereas the record shows that bondholders representing $1,500,000 opposed Pickering to the last, and that $1,000,000 of the bonds were never represented in court.

CONSIDERABLE INQUIRY having been made as to the scope of the decision of the Supreme Court of Missouri, in Johnson v. Township Board of Education, we give the opinion in full: HOUGH, J.: "This was a proceeding to enjoin a township board of education in Clinton County from removing a school-house in a certain sub-district, and from carrying into execution an order of said board to re-district the township. A temporary injunction was granted, which, after answer filed, was, on motion, dissolved. The only judgment in the case is one dissolving the injunction, and awarding one cent damages and costs against the sureties in the injunction bond. Appeals are allowed by our statute from final judgments only. This is not a final judgment. It has been held in Illinois (Titus v. Mabee, 25 Ill. 257), and, perhaps, elsewhere, that where an injunction is the sole object of the bill, a decree dissolving the injunction may be regarded as final for the purpose of an appeal. But a different rule was established in this state more than fifty years ago, in the case of Tanner v. Irwin, 1 Mo. 65, and that rule has been recently followed in the case of Carpenter v. Talbot, decided at the February term, 1873, at St.

Joseph, but not reported. The appeal is premature, and must be dismissed. All the judges concur, except Judge Sherwood, absent."

THE ADVICE which Polonius gave in order that one might "by indirections find directions out," has not been thrown away upon the Missouri Supreme Court, as the following facts will show: At the October term, 1871, the supreme court adopted rules requiring the filing of *printed* records, briefs, etc. The General Assembly, by an act passed in January, 1872, abrogated these rules, and vindicated the sanctity of manuscript. At the last term the supreme court adopted some "new rules," of which No. 15 requires plaintiff in error, or appellant to fill "*seven copies* of an abstract or abridgment of the record," in all cases, and deliver *one* copy to the adverse counsel. Rule No. 16 requires counsel to file "seven copies of a brief," etc. Rule No. 18 provides that, for failure to comply with the provisions of rules 15 and 16, the court may examine the appeal or writ of error, or continue the case at the cost of the party in judgment, at the option of the adverse party. The new rules, requiring eight copies of the record and seven of the briefs, will operate practically to require the printing of these documents, in spite of the statute, which provides that the court "shall have no power to make or enforce any rule for the printing of the record, transcript, statement or brief."

A CONTRARY view from that taken by Duval, J., in the case reported in our last issue (p. 149), of the subject of the lawfulness of the intermarriage of whites and blacks, was taken by Hon. John Erskine, the very able and cultivated judge of the U. S. District Court for the District of Georgia, in *Ex parte Hobbs*, 1 Woods C. C. 537. Hobbs, a white man, had married and cohabited with a colored woman, having first obtained a license therefor from an ordinary. He and the woman were tried, convicted and sentenced to imprisonment for fornication, in a state court, under § 1707 of the Geogia Code, which provides that "the marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void." This enactment was in force when the Georgia Constitution of 1868 was adopted, which provides (Art. XI, § 1) that "the social status of the citizen shall never be the subject of legislation." But in Scott v. The State, 39 Ga. 321, the Supreme Court of Georgia held that that statute was not repealed by this constitutional provision. Judge Erskine, of course, accepted this as a conclusive interpretation of the state constitution and statute, binding upon him as a federal judge. But the main question was, as in the Texas case, whether the Georgia statute was not prohibited by the fourteenth amendment and by the civil rights law. The learned judge held that it was not. In giving his judgment, he said: "I have given the matters involved in this suit careful consideration, and I am of opinion that neither Congress, in framing the fourteenth amendment, nor the people when they ratified it, contemplated that questions of this nature were comprehended within the terms 'privileges and immunities' as employed in that instrument. The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I can not think it was intended to be restrained by the amendment, so long as the state marriage relations do not deny to the citizen the equal protection of the laws. Nor do I think that the state law operates unequally; the marriage relation between whites and colored can not exist under the statutes of this state—it is null and void as to both. And the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that—and none other—which is inflicted on the white citizen, the co-offender. In my judgment, neither section 1707, which inhibits marriage between a white person and a person of African descent, nor sections 4245 and 4487, which provide for the punishment of colored and white persons who are found guilty of the crime of fornication, fall within the influence of the provisions contained in the fourteenth amendment or the civil rights bill." The parties were remanded to the custody of the jailor. It will be seen that the distinction between the Georgia statute and that of Texas is so marked that the two decisions may well stand together.

AN ANIMATED controversy has arisen between Lord Justice Christian of the Irish Court of Appeal, and the Incorporated Council of Law Reporting for Ireland. The Lord Justice, who appears to be in the habit of speaking his mind very freely and even rudely, has several times taken occasion to denounce the "authorized" edition of Irish Reports, in severe language. Recently he made a long speech from the bench denouncing it in terms so harsh that the "Council" put forth a manifesto in its own defense. As an appendix to this manifesto there is published a voluminous correspondence between the Lord Justice and Mr. Swifte, the barrister employed by the court to report the decisions of the court of appeal, and also between the Lord Justice and the "Council" itself. Some of these letters are quite interesting. In one of them the Lord Justice warns Mr. Swifte as follows: "I must now once more warn you that I can not permit, without public protest, the putting forward, as judgments of mine, tissues of senseless and incoherent jargon, of the kind, as being which my utterances have nearly always commended themselves to your intelligence." And in another letter to him he says: "The poverty-stricken scale upon which, unavoidably, as I do not doubt, the present series of Irish Reports has been maintained since its starting, has resulted in the offering of a very sorry picture of Irish legal transactions to those who can know of these transactions only through the reports. It is humiliating that the two attenuated and ill-assorted volumes which are the whole an-

nual product of the Committee of Law Reporting in Ireland and its staff, should go to England and elsewhere as containing (what *we* know that in truth they do not contain at all) the *elite* of the weight and quality of the occupation of the Four Courts."

As Lord Dundreary speeded the departure of his servant by giving him the "compliments of the season," so Lord Christian closed the letter just quoted from, with the hope that it would be accepted "without need for further correspondence." This letter only served, however, to call forth another, in which the Lord Justice said, "It is long since it was brought home to me that either I lack the capacity of speaking or writing plain English, or you that of understanding it when uttered by me;" and in which he concludes by expressing a trust "that all need for letter-writing on both sides is now at an end." But it did not end; it was resumed between the Lord Justice and the chairman of the "Council;" and the upshot of it all was that the Lord Justice formally severed his connection with the "Irish Reports," and that the "Council" agreed that, in the event of their putting forth any matter assuming to be reports of judgments of the Lord Justice, they would insert, "at the foot of each such pretended report," that it was not revised by him. Mr. Swifte, however, was not dismissed. A former Lord Chancellor, a Vice-Chancellor, and the editor of the authorized reports, all testified to his fitness.

From this correspondence and such press comments as we have seen, it would seem pretty clear (1) that the "Irish Reports," as a whole, are not of much value; (2) that Mr. Swifte, the reporter for the Court of Appeal, has been most unreasonably assailed by Lord Justice Christian; (3) that if Lord Christian speaks as badly and violently as he writes, no reportorial skill could reduce his utterances to the plain, straight-forward and calm language which should characterize legal judgments; (4) that he is evidently a man so entirely lacking the judicial temperament that, however great his learning may be, his judgments would not be of much value if reduced to good English and reported; (5) but that if the bar nevertheless desire to have his judgments reported, and a reporter, evidently well qualified, can not succeed in making them intelligible, it is the manifest duty of the Lord Justice himself either to deliver them in writing or to write them out after he delivers them. When we consider the salaries paid to the Irish judges;—salaries which to American judges would seem fabulous—when we see a justice of the Supreme Court of the United States editing in a most acceptable manner some of the reports of his court; when we look at the voluminous and excellent reporting done by other Federal judges—by Dillon, Woods, Blatchford and MacArthur—in addition to an amount of judicial labor which staggers belief—the attitude in which this Irish judge has placed himself seems absolutely puerile.

ENGLISH AND AMERICAN LAW.*

I.

Probably there is no country to which we can look, so far as jurisprudence is concerned, with greater interest and profit than to the United States of America. Not, indeed, that we may not consult with advantage the laws of other countries, such as Canada, India, and our neighboring colonies; but the laws in force in America, from its historical associations and present importance, demand special consideration. Being once a dependency of Great Britain it was subject to the laws of England, so far as applicable, and these laws may be taken as the basis on which the jurisprudence of all the present states of America is founded.

So, with us, the origin and principles of our laws are English, although numerous innovations have been made from time to time. The law in operation in this colony is divisible into what may be determined substantive and adjective law, the former giving the right, and the latter regulating the remedy.

It may not be uninteresting to allude to some of the changes which the Americans effected before, but more especially since, the revolution, which severed their connection with the home country, and which led to their becoming an independent nation. We occasionally hear allusions made to the law of America, but such a reference is somewhat ambiguous, and is certainly calculated to mislead. The expressions law in America and the law of America frequently convey totally different meanings. The laws in operation in the United States may be considered under two heads—namely, Federal Law on the one hand, and State and Territory Law on the other. The Constitution of the United States, and also the constitutions of the various states, make ample provision for the ordinary legislative, judiciary, and executive functions of a government. It may be safely asserted that no two states or territories have similar laws, which, however, though varying in details are generally not dissimilar in principle. Each state has apparently vied with the other states in producing a system as free from anomalies as possible. Although I am far from maintaining that we should blindly adopt the innovations which have there been made in English law, still I am satisfied that we should give them more attentive and impartial consideration than they generally receive. Hitherto we have confined our attention too exclusively to the English statutes, which have been to our legislators a sort of text-book. Nearly all the important changes which have been made in our laws have been adopted, and that, sometimes, very tardily, from the home statutes. Before proceeding further it may be desirable to draw your attention to an important distinction between the Constitution of Great Britain and that of the United States. The constitution of the former is unwritten, and has

*A lecture delivered to the Otago Law Students' Society, on the 24th June, 1876, by Wm. Downie Stewart, Esq., of the Supreme Court of New Zealand, Barrister-at-Law.

been moulded from time to time as circumstances required. The Parliament of Great Britain has supreme authority to make, repeal, or modify any law it pleases, and the judges have no power to call in question the validity of any statute passed, although they may be of opinion that it is unjust, or even unconstitutional in the sense in which the latter word is used in England. Moreover, one Parliament can not pass an act fettering in the slightest degree the power of a subsequent one; but even there the word "supreme" must be understood in a relative sense—the ultimate power being in the people. The Constitution of the United States, however, is a written one, and any act passed by Congress which conflicted with its terms would be inoperative and disregarded by the judges; or, if necessary, declared illegal. Each state also has its own written constitution, and any law of the state legislature passed at variance with its provisions would be declared unconstitutional. There is, however, a broad distinction between a statute passed by Congress, and one passed by a state legislature, The former can legislate only on matters specifically authorized by the Federal Constitution, whereas the latter can pass laws relating to all matters not expressly prohibited by the federal or local constitution. In referring to the power possessed by American judges, Austin, in his 39th lecture, states that Colonel Murat, who practiced in some of the American states, informed him that the acts of some of the state legislatures were habitually over-ruled by the Bench and Bar; that, in fact, it was quite a common thing for the judges, after a session of the legislature, to assemble for the purpose of considering the acts passed and determining which of them were binding, and that if an act were considered unsuitable it was rejected *sans ceremonie*. It would appear also that the opinion of the judges was uniformly endorsed by the public at large. With very great deference to the authority of Colonel Murat, I am disposed to think that his statement is calculated to convey an erroneous impression. That the judges of some of the states were in the habit of assembling in the manner stated, I do not doubt, but in so doing they were acting extra-judicially, and their opinion had no legal effect. The judges, I apprehend, have no authority, except in cases actually under their consideration, to give a decision on the effect of a particular statute. Indeed, according to two comparatively recent cases, one of which was decided in Iowa and the other in Pennsylvania, the courts hold that, unless a statute violates the constitution clearly, palpably, plainly, and in such manner as to leave no reasonable doubt, it will not be held unconstitutional.

Having made these general remarks, I may now proceed to consider the procedure in our supreme court, which is unnecessarily cumbrous, and the expenses are generally out of proportion to the interests involved. The result is that the public in all parts of the colony have a dread of litigation, and instead of readily resorting to this court to have their grievances redressed, they prefer submitting their disputes to arbitration, or reducing their claims so as to bring them within the jurisdiction of the lower courts. The remarks of Herbert Spencer in referring to the adminstration of justice in England, in his interesting work on "Social Statics," may, with little modification, be applied to the judicial system in force in this colony. He states "that we, the independent, determined, self-ruling English should daily behold the giant abominations of our judicial system, and yet do nothing to rectify them, is really quite incomprehensible. It is not as though the facts were disputed. All men are agreed upon them. The dangers of law are proverbial. * * * This gentleman has been cheated out of half his property, but dare not attempt to recover it for fear of losing more, whilst his less prudent companion can parallel the experience of him who said that he had only twice been on the verge of ruin: once when he had lost a law suit, and once when he had gained one." A radical reform in the present system of administering justice is much needed, otherwise the supreme court will fail to serve the purposes for which it was constituted. One or two suggestions may not be unworthy of consideration. The jurisdiction of the district courts might be extended so as to enable them to take cognizance of all cases over which the supreme court has jurisdiction, except certain special business, such as cases of divorce, remedial writs, etc., in which matters the supreme court could retain original jurisdiction, and be an appellate court in other respects. The facts of case a could be ascertained at comparatively little expense in a district court, and a simple mode of appeal provided whereby either party dissatisfied with the decision of the lower court on the law bearing on the facts could have had it reviewed by the supreme court. Another course might be adopted, namely, to simplify the procedure in the supreme court. The system of involved pleadings might be improved, by making it more simple and less hazardous to litigants. Even under the present practice the real facts in controversy are frequently not discovered until near the close of a long trial, or probably not until it is over. The result is a miscarriage of justice, eventuating in an application for a new trial at considerable expense; the second trial may be attended with no more satisfactory result. The merits of a case are, under the present rules of pleading, occasionally sacrificed, neither judge nor jury being permitted to give an opinion on them. Moreover, the expenses of an action in the supreme court are excessive, and are almost the same in amount whether the money or property at statke is much or little. An action for £200 in the district court may be heard and determined at a cost of about £25, whilst one in the supreme court for, say £220, may entail on the losing party a sum for costs in excess of the amount sued for. Indeed, there are many cases in which the sum for which a verdict is given forms but a small item in the total amount which the defendant has to pay. Nor does a successful plaintiff always reap much from the

fruits of his judgment. His solicitor may have incurred a great deal of expense in resisting vexatious interlocutory applications in chambers on the part of the defendant. In addition to these considerations one out of many illustrations may be given to show how imperfect, and in some respects incongruous the present practice is. An application may be made to a judge in chambers on summons taken out by one party to have the pleadings of the opposite party amended or struck out. The learned judge, after listening to elaborate arguments by the solicitors on either side, and after taking time to consider his decision, may give judgment in favor of the defendant. The plaintiff, being dissatisfied with it, may make an application *in banco* for a rule *nisi* to rescind the order made in chambers. After argument, a rule *nisi* may be granted, and in due course set down for argument by the same solicitors, who are now, however, designated counsel. They may repeat the same arguments, cite the same cases, and the result of all this may be that the court (represented by the learned judge who sat in chambers) affirms the decision of the learned judge who made the order. The costs of the application in chambers were probably not more than two or three guineas, whilst those connected with the proceedings *in banco* not unlikely involve the losing party in a liability of £30 or £40. Of course many of you are, no doubt, aware how interminable some actions are, one motion after another being made in chambers and *in banco* until the question which the cause was commenced to settle becomes of secondary importance. On the other hand, the practice in some of the lower courts, particularly in the resident magistrate's court, is open to serious objection. The costs allowed a successful party are much too small, and this circumstance encourages litigation. A defendant may refuse to pay a just debt in the hope that his creditors will not sue for its recovery, and well knowing that he (the defendant) may put the plaintiff to trouble and expense, for which he can get no compensation, except in having the fee for the summons refunded. The defendant should, in all cases in which he pays the money into court (if not previously tendered), or confesses judgment, be saddled with the costs of the plaintiff's solicitors up to the time the action is settled, and these costs should be proportioned to the amount really due.

Whilst on this subject I may observe that the Lord Advocate of Scotland has been endeavoring to effect a reform in the judicial system in operation there. At present the sheriffs' courts have very extensive civil jurisdiction. All cases decided in them are first heard before the sheriff-substitute, generally a judge of great experience and learning. From his decision an appeal lies to the sheriff, from whose judgment, when the amount involved is beyond a certain sum, an appeal lies to the court of session. The contemplated reform, if brought about, will extend the jurisdiction of the sheriff's court yet further, and make the court of session practically a court of appeal only. Whether with us the jurisdiction of the district court should be enlarged, or the procedure in the supreme court simplified, the great aim of any reform should be expedition, reduction of costs in the higher court, and finality of litigation.

I shall now give some particulars regarding some of the courts in America, which may be useful. The United States (Federal) courts are numerous. The supreme court consists of a chief justice and eight associate judges, six of whom form a quorum. The court has exclusive jurisdiction over all cases relating to treaties, maritime and admiralty cases; controversies between states or the citizens of different states; questions affecting the rights of ambassadors, etc. It has also an extensive appellate jurisdiction. The states have been divided into something like fifty-six districts, sub-divided into nine circuits, in which federal circuit courts are held. These courts dispose of cases which the state courts are incompetent to entertain;* for example, in actions in which the United States are plaintiffs, and in proceedings under the revenue laws. There are also courts of claims,† to which I need not particularly allude, and territorial courts. In the territory of Utah there are three judges who collectively constitute the supreme court, which is an appellate court. Each of the judges, when sitting separately, acts as a district judge, and, as such, has original jurisdiction in nearly all matters, and when the amount involved is over $1,000 an appeal lies from the local supreme court to the United States Supreme Court. Each state has its own supreme and inferior courts. There is a general similarity between the respective courts of many of the states, and probably by describing briefly the judicial system in one state, an idea may be gained of that in force in several of the other states. From the judgment of the supreme court of a state there is no appeal. Its decisions are final, and are not amenable even to the highest federal court.‡ Indeed, the state and federal courts are as independent of each other as are courts of different nations; nor has the President of the United States power to pardon or grant a reprieve to a person found guilty and sentenced by a state court. The judges in most of these states, except those in the six New England states, are, I believe, elected by the people. This has always appeared to me to be a serious blot, yet I never met with an American who did not support this right.‖ They reason the matter somewhat after this method: All public servants should be appointed by the people. Judges are public servants, *ergo* they should be elected by the people. In California the courts are the supreme court, district courts, county courts, probate courts, and

*This is inaccurate. It is believed that nearly all the cases of which the United States Circuit Court has original jurisdiction are also cognizable in the state courts.—ED. C. L. J.

†There is but one Court of Claims.—ED. C. L. J.

‡Except where a "federal question" is involved.—ED. C. L. J.

‖It is believed that a majority of the American *bar* do not support it.—ED. C. L. J.

justices' courts. The jurisdiction of the supreme court is chiefly of an appellate nature, but it has original jurisdiction in dealing with writs of habeas corpus, certiorari, and mandamus. There are five judges, and the one who has the shortest term of office to run presides as chairman. The business brought before the court is very great, and is expeditiously disposed of. The judges constitute a strong bench, and their decisions are highly respected as evincing ability and impartiality. Sacramento being the capital of California, is nominally the headquarters of the court, but it frequently sits in San Francisco for the convenience of the profession. The latter city, from its commercial importance, is likely, ultimately, to be the principal seat of the court. When in San Francisco, the supreme court was sitting there, and I had therefore an opportunity of paying it a visit. All the judges were on the bench, and there were about one hundred lawyers present. Neither judges nor counsel wore wigs, bands, nor gowns. Chief Justice Wallace was chairman, and on either side were the associate judges—namely, Judges Crockett, Niles, Rhodes, and McKinstry. The case before them was an application for a new trial. The counsel addressing the court was a good speaker, and delivered a very able address, in which he pointed out the origin of the difference between an application to a court of equity and that to a court of law for a new trial. The judges interposed occasionally with such questions as, "Would your arguments apply if," etc., and "Do you contend that," etc. None of them manifested any desire to anticipate the arguments of counsel, nor did any of them interrupt counsel unnecessarily. There is a weekly publication of the reports of the court, issued every Tuesday, called the *Pacific Law Reporter*. There are now something like fifty volumes of standard California reports. The Law Library in San Francisco is very large, containing probably about fifteen times as many law books as there are in the Dunedin Law Library. So, also, in New York, there is a very large Law Library, equal, if not superior, to that in the West. When in New York I met the librarian, and also his assistant. I furnished particulars regarding our reports and statutes, and should any of you visit that city a year or so hence you will most likely find in the Law Library the reports and statutes of these colonies.

The district courts have no appellate jurisdiction, but they have an extensive original jurisdiction in all causes where the sum involved amounts to three hundred dollars and upwards. The court can decide disputes relating to the title or possession of real property, and dispose of all equity business. A jury may be dispensed with by the consent of both parties. This is probably preferable to the opposite course of trying an action without a jury, unless the plaintiff or defendant demands one. These courts are held at various places throughout the state. The county courts hear appeals from justices' courts, and have jurisdiction in insolvency and other business not coming expressly within the jurisdiction of the other state courts. The probate courts have jurisdiction in regard to wills, and the administration generally of the estates of deceased persons. And the justices' courts have jurisdiction in cases where the amount in dispute is under three hundred dollars.

I have given a brief description of the judicial system in force in California for several reasons. It is a comparatively young and yet a very important state, and its legislators have been able to profit by the experience of the legislators of older states. Moreover, its code of civil procedure is probably more complete and instructive than that of any of the other states.

In Michigan there is a supreme court which has original jurisdiction to issue remedial writs, such as writs of mandamus, prohibition, etc. In other respects it is an appellate court exclusively. There are circuit courts which have, with certain special exceptions, jurisdiction in all actions and proceedings, and there are also probate and justices' courts.

Nearly all the states have a code of procedure, and it would certainly be a great advantage if such a code existed in this colony, instead of having acts relating to the administration of justice in almost every volume of the statutes of the General Assembly. Nor would such a code be difficult to frame, it being a very different proceeding from codifying all the laws of the colony. As an illustration of the tendency in America to codify, I may mention that, in the State of California they have a penal code, a civil code, a code of procedure, and a political code. Amongst the important alterations effected by the New York code, passed many years ago, I may mention that the distinction between legal and equitable remedies was abolished, and that where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. An injunction may be obtained to protect a defendant's property where it appears by affidavit that he threatens to dispose of such property so as to defraud his creditors. One of the sections provides that the allegations in a pleading shall be liberally construed so as to effect substantial justice between the parties. Except in certain actions, all costs are in the discretion of the court, and when costs are allowed, the amount is fixed according to a scale. For example, for all proceedings before notice of trial, in an action in which the plaintiff would be entitled to judgment without application to the court, $15, and to either party on appeal before argument, $30; for argument, $60. Under section 218, the defendant may recover, by way of set-off, any amount due to him in excess of the plaintiff's claim (see our rule 105); or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. A somewhat similar provision has been inserted in the rules framed under the English Supreme Court of Judicature Act, 1873. Already, in the case of Hillman v. Mayhew, decided in February last, and reported 34 L.T. N.S. 256, a decision

on this branch of the act has been delivered. Singularly enough, the circumstances of that case came almost within the letter of the precedent given in the rules framed under the act. In the colony of Queensland, under the common law procedure act of 1867, it is provided that all matters which were then only the subject of a cross action might thereafter, by leave of a judge, be pleaded by way of set-off.

I may here remark that, in California an applicant for admission to practice in a state supreme court must be at least twenty-one years of age, and produce satisfactory evidence that he has a good moral character. He must also declare his intention to become a *bona fide* citizen of the State, and pass a strict examination in open court. On admission to the supreme court, the applicant is entitled to practice in all courts in the state. He may, however, apply to be admitted to practice in the district or county courts, in which case, on admission, he can practice only within the respective limits of these courts. No articles of clerkship or pupilage appear to be necessary.

[TO BE CONTINUED.]

OFFICIAL BOND — POWER TO REFORM WHEN DEFECTIVE.

TRUSTEES OF SCHOOLS, ETC., v. ALBERT L. OTIS *ET AL.*

Supreme Court of Illinois, January Term, 1877.

[Opinion filed June 22, 1877.]

HON. JOHN M. SCOTT, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOFIELD,
" PINCKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Associate Justices.

A COURT OF CHANCERY will not assume jurisdiction to reform an official bond that is defective and not binding upon the principal or sureties.

SCOTT, J., delivered the opinion of the court:

This bill was filed in the McLean County Circuit Court by the trustees of schools T. 24, N. R. 2, E. 3d P. M., against Albert L. Otis and his sureties, to so reform his official bond as treasurer of that township that his sureties might be liable for the default of the treasurer. As written, the bond is made "to the board of trustees in said county," in the penal sum of $25,000, and bound Otis as treasurer of township 24, N. R. 3 E., in said county, to faithfully discharge the duties of such office. The principal allegations of the bill are, that at the time of the execution of the bond it was the agreement and understanding defendants should execute a bond payable to the board of trustees of T. 24 N. R. 2, E. 3d P. M., with the condition annexed the principal should faithfully discharge the duties of such office, and "that by mutual mistake on the part of said board of trustees, who accepted and approved said bond, and on the part of the said parties who executed said bond, the said bond in the penal part thereof failed to state fully who were the payees of said bond, and in the conditional part thereof designated the range as "three" instead of "two." "The prayer of the bill is that the bond be corrected, and for a decree against the principal and his sureties for the amount the treasurer is in arrears to the township. The court sustained the demurrer interposed, and dismissed the bill. Complainants bring the case to this court on appeal.

Whether a court of chancery will assume jurisdiction to reform an official or other bond against sureties, is a question upon which the authorities are not harmonious. The point has never been directly decided by this court; but on first impression we are inclined to adopt the doctrine of those cases that declare the extent of the obligation of a surety is to be determined by the agreement he actually signed, and that it can not be varied, changed or enlarged by any decree of court, as founded in the better reasoning and more fully sustained by authority. One reason that lies at the foundation of this series of cases is, that no equities arise in favor of a party seeking a reformation of a bond not binding at law against a mere surety who has received no consideration for the agreement it is alleged he intended to make but did not. The surety may stand upon the terms of the bond he has executed, and if that does not bind him, upon what equitable principle can it be said his agreement shall be reformed so that he shall be made to bear the burden that will otherwise fall on the parties seeking relief. Under our statute of frauds no man can be charged upon a promise to answer for the debt, default or miscarriage of another person, unless such promise or agreement shall be in writing. On principle it would seem to admit of no doubt, if a party has made no such promise or agreement in writing for himself, no court can make any for him, whatever his intentions may have been. It is not his agreement unless he assents to it after it is reformed. As sustaining in a measure the views expressed, we cite Phelps v. Garron, 3 Paige, 322; Ontario Bank v. Mumford, 2 Barb. Ch. 596; Miller v. Stuart, 9 Wheat. 681; State v. Meday, 17 Ohio, 567; Ludlow v. Simmons, 2 Caines' Cases in Error, 1. The bond which complainants seek to have reformed is the official bond of the township treasurer made to the trustees of schools. It is conceded that the bond as written is so defective it is not binding at law, either upon the principal or sureties; and we do not see how a court of chancery can correct it so as to make it obligatory upon the latter. The effect would be, if that should be done, to make a contract for them by decree of court which they never made for themselves, compelling them to assume large pecuniary liabilities without any consideration whatever. But, independently of this view of the law, the decision may be placed on the same ground as in Atter v. Cairo Dem. Co., 72 Ill. 434. The cases, in some respects, are analogous. That was a bill to reform a replevin-bond which contained the name of no obligee or payee. The decision is based on the ground that the bill contained no allegation that it was the intention to fill the blank in the bond with the name of defendant in replevin, and that the omission was the result of mutual mistake. The bond in this case contains the name of no payee or obligee. The allegation is "that by mutual mistake on the part of said board of trustees who approved and accepted said bond, and on the part of the said parties who executed said bond, the said bond in the penal part thereof failed to state fully who were the payees of said bond." This allegation is too vague to warrant the interposition of a court of chancery, even under that class of decisions which declare such instruments may be reformed. It makes no difference, it is alleged, it was the intention of defendants to make their bond to complainants in accordance with the provisions of the statute to secure the faithful discharge by the township treasurer of his duties as such officer. That very point was decided in Atter v. Cairo Dem. Co., *supra*, where it is said "it

may be it was the intention of the parties, as alleged, that the instrument should be a replevin bond, in the suit about to be instituted, but that is not sufficient." The same view of the law was taken in Phelps v. Garron, by the chancellor, in delivering his opinion in that case. The demurrer was properly sustained, and the decree dismissing the bill must be affirmed.

Decree affirmed.

DAMAGES—DEFECTIVE COAL SHAFT—ACTION UNDER ILLINOIS STATUTE.

WESLEY CITY COAL CO. v. ANN HEALER.

Supreme Court of Illinois, September Term, 1876.

(Opinion filed at Ottawa, June 22, 1877.)

HON. JOHN M. SCOTT, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOFIELD,
" PINCKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Associate Justices.

1. UNDER THE STATUTE OF JULY 1, 1872, compelling owners of coal mines to make escapement-shafts in their mines, and giving a right of action to any one damaged by a failure on the part of an owner to comply therewith, *held*, that proof of failure on the part of an owner so to comply with the statute, and that such failure *contributed* to the injury complained of, entitles plaintiff to recover, notwithstanding the *immediate* cause of the injury may have been the result of accident, and not the result of any fault on the part of the owner.

2. CONTRIBUTORY NEGLIGENCE—ALARM.—A party having given another reasonable cause for alarm, can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm.

APPEAL from the Circuit Court of Peoria County.

DICKEY, J., delivered the opinion of the court.

There came into force on the first day of July, 1872, a statute of the State of Illinois, by which, among other things, it was enacted that in all coal mines * * * in operation prior to the first day of July, 1872, and which are worked by or through a shaft * * * in which more than fifteen miners are employed, if there is not already * * * a communication between * * * said coal mine and some other contiguous mine, there shall be an escapement-shaft making at least two distinct means of ingress and egress for all persons * * * permitted to work in such coal mine. * * * Such escapement-shaft or other communication with a contiguous mine, as aforesaid, shall be constructed in connection with every vein or stratum of coal worked in such coal mines; and the time to be allowed for such construction shall be one year for each one hundred feet in depth of such escapement shaft, so to be constructed, or fractional part thereof. * * * For any injury to person or property occasioned by any wilful violation of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any *direct damages* sustained thereby; and in case of loss of life *by reason of* such wilful violation, or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, * * * for a like recovery of damages for the injuries sustained by reason of such loss of life."

The appellant, in November, 1874, was the owner of mines called The Hope Mines. These mines before July, 1872, were in operation and consisted of one main perpendicular shaft communicating with three several veins of coal; the first, some seventy feet below the surface of the earth; the second, some sixty-five to seventy feet lower than the first vein; and the third, some one hundred and twenty feet lower than the second vein. In November, 1874, the appellant was not working the first or upper vein, but working both the second and third veins. There was an escapement-shaft which had been sunk to the first vein, and which, by the excavations on that plane communicated with the main shaft. There was no escapement-shaft from either the second or third veins, and there was no communication from either of these veins connecting with any contiguous mine or mines, and there never had been. The only mode of ingress and egress to the second and third veins was by way of the main shaft. The second vein was less than two hundred feet below the surface of the earth, and more than two years had elapsed since the statute came into force. In November, 1874, notwithstanding the want of the required second mode of ingress and egress required by the statute, the appellant was working in the second vein more than fifteen men, in direct violation of the statute. Appellant was at the same time working a number of men in the third vein. In this condition of affairs some combustible material in connection with the "up-cast" or flue provided to conduct the smoke from the furnace operated for ventilation took fire; and, by reason of the burning, a quantity of smoke was produced and thrown into the main shaft above the second vein. The devices for ventilation were such that, by the currents of air, this smoke was carried (besides to other places) down the main shaft and through some of the passages and chamber of the second vein, causing great alarm among the miners and darkening the passages. The miners generally rushed to the main shaft, that being the only possible avenue of escape. The husband of appellee at that time was a laborer in the second vein. The evidence tends to show that he, among others, rushed towards the main shaft in the midst of the general alarm, and that by reason of the darkness, or from some other cause incident to the affair, he fell down the main shaft to the bottom of the third vein, and thus lost his life.

This is an action brought under that statute by the widow of the deceased. Appellant insists that the fire in the "up-cast" was not the result of any fault of the company, and that without fault in this respect appellant can not be charged with the consequences of the fire. This position is not tenable. The evidence as to whether the fire was purely accidental or the result of improvidence on the part of appellant is contradictory and does not clearly settle that question. But assuming that the fire was purely accidental and not the result of any fault on the part of appe lant, still, upon the conceded facts of the case, the appellant is plainly liable. The statute was intended to provide against just such unavoidable accidents in mines, by which many valuable lives had been lost. The company confessedly had failed to construct the escapement-shaft required by the statute, and confessedly, with a full knowledge of the want of any second mode of escape from that vein, continued to work more than fifteen men in that vien. This renders the appellant liable for all direct damages sustained by reason of the want of the second mode of escape.

The only remaining question is, whether the death of appellee's husband can properly be said to be one of the direct consequences of the want of an additional escapement-shaft. The jury have found from the evidence that it was one of the direct consequences, and we think the evidence in this regard fully authorized that finding. It is said there was no real danger. That the fire was readily extinguished, and had the men staid at their work, they would have suffered no harm. All this is very true. That, however, is not the hinge on which this question turns. It is equally

true that men of ordinary prudence, with a full knowledge that there was but one mode of escape from this mine, hearing a cry of fire, finding the mine filling with smoke, and that from a fire burning in the main shaft at a point above them, and past which they must be carried, if they escape at all, would ordinarily be very much alarmed, and, in most cases, lose their ordinary presence of mind. The natural consequence of such a combination of facts would be a rush of the men for the carriage at the main shaft, and in the smoke and darkness, another very probable consequence would be that some one or more of these men in this confusion would, by some misstep or the jostle of a companion, lose his footing and fall down this shaft. Had there been a second mode of escape, no such cause of alarm would have existed. Men of ordinary prudence would have felt safe and been left to exercise their caution in avoiding accidents on their way to a sure mode of escape. A party having given another reasonable cause for alarm, can not complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm. The jury, under the circumstances, may well have found that the death was the direct result of this alarm, and that the alarm or fright resulted directly from the want of a second mode of escape. The law of the case seems to have been correctly stated in the instructions. We find no sufficient ground to disturb the verdict or judgment.

JUDGMENT AFFIRMED.

FRAUDULENT CONVEYANCE — TITLE UNDER.

FOWLKES v. HARRIS.

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOMAS J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Justices.

1. VOLUNTARY CONVEYANCE—TITLE.—A voluntary conveyance of property, made for the purpose of defrauding the creditors of the grantor, will pass the title to the grantee, and the property will be subject to levy or sale as the property of the latter, at the suit of his creditors.

2. REPRESENTATIVES AND PRIVIES.—Though the conveyance be subject to disaffirmance for fraud at the suit of the creditors of the grantor, it can not be impeached by the representatives, heirs, or devisees of the grantor, or by any person claiming under him.

3. SHERIFF'S DEED.—Recitals in a sheriff's deed are conclusive as against third parties.

MCFARLAND, J., delivered the opinion o the court:

Several actions of ejectment were brought by the heirs of Wm. P. Harris to recover certain lands in Shelby County. In each case, Mrs. Sarah W. Fowlkes, executrix of Jeptha Fowlkes, deceased, as she is styled, was admitted to defend in the place of the persons sued, and filed in each case the plea of not guilty.

The causes were tried before a special judge, a jury being waived. The judgments in each case were for the plaintiff; a bill of exceptions was taken in one case, with an agreement that the other cases should abide the result of the one; and a writ of error has been prosecuted by Mrs. Fowlkes to this court.

The plaintiff below claimed title through Sterling Fowlkes, under a sheriff's sale and deed, under a judgment in favor of Johnathan L. Barnard against Jeptha and Sterling Fowlkes, under which it is claimed the land in controversy was levied on as the land of Sterling Fowlkes and sold, and bought by said Jonathan L. Barnard; that afterwards, Sterling Fowlkes confessed a judgment in favor of Jeptha Fowlkes, which the latter assigned to W. R. Harris, and thereupon said Harris redeemed the land from Barnard, and took the sheriff's deed to himself, in which Barnard also joined.

1. For the defendant, Mrs. Fowlkes, it is insisted that Jeptha Fowlkes was the real owner of the land, and that the plaintiff's ancestor acquired no title under his purchase of the land as the property of Sterling Fowlkes. That the legal title was in Sterling Fowlkes is not denied, but it is argued that he held the naked legal title as trustee for Jeptha Fowlkes. This argument is predicated upon the testimony of Sterling Fowlkes. His deposition had been taken in another case and was read in this case; from which it appears that one Gaines made a deed of trust conveying this land to Charles Lofland and another, to secure a debt due to the Farmers' and Merchants' Bank of Memphis; that Lofland sold the land under the trust deed, and it was struck off to Sterling Fowlkes, and the trustee's deed made to him, which was duly registered. Sterling Fowlkes, in his deposition, says that Jeptha Fowlkes or his agent asked his permission to use his name in the purchase of the land; that he was not present at the trust sale, and made no bids and paid nothing for it. He understood that Jeptha Fowlkes paid the consideration for the land; at all events he caused the deed to be made to him, the said Sterling; and that he held the land in trust for the said Jeptha and not for himself. He further says, that when the officer came to him with the execution in favor of Barnard, he gave the officer this tract of land to be levied on, telling him, however, that Jeptha Fowlkes was the equitable owner, but as he (said Jeptha) was the real debtor in the case, his property should pay the debt. When asked why the land was conveyed to him instead of Jeptha Fowlkes, he says: "I suppose partly to prevent the creditors of Dr. Fowlkes (Jeptha Fowlkes) from getting it, and partly to secure me, and to get me to go his security. It was setting a trap for me." We do not doubt the proposition argued for the plaintiff in error, that, where the legal title to land is held by a trustee in trust for another, the trustee having the mere naked legal title, it can not be sold under an execution against the trustee. But we think the testimony does not show a valid trust in favor of Jeptha Fowlkes in the land. No reason or explanation is given for conveying the land to Sterling instead of Jeptha Fowlkes, consistent with the idea of a *bona fide* trust; no such contract or agreement between them is shown. True, Sterling Fowlkes says he held the land in trust for Jeptha Fowlkes, but, taking his testimony as a whole, it does not support the idea of a trust.

It is also true that where one pays for land which is conveyed to another, in general the laws as between them will imply a trust in favor of the former. But here Sterling Fowlkes admits that the conveyance to him was to hinder and delay the creditors of Jeptha Fowlkes. Whether he knew this fact or not, it is the only explanation given; and if the arrangement was not the creation of a *bona fide* trust, he must have known it.

Taking it, then, that this was a fraudulent device of Jeptha Fowlkes to avoid his debts, we hold that no trust could be raised in his favor out of the transaction, and that the purchaser of the land at an execution sale as the land of Sterling Fowlkes, acquired a valid title as gainst Jeptha Fowlkes, his heirs or devisees. Whether such a transaction would be strictly within the statute of Elizabeth, or our statute, which declares void, conveyances made to hinder and delay creditors, the deed in this case not having been made by Jeptha Fowlkes, we do not stop to inquire. We think it clear

upon general principles of equity, that the creditors of Jeptha Fowlkes might in equity, upon the ground of the fraud, have reached the land to satisfy their debts; and also equally true that, as between Jeptha and Sterling Fowlkes, the conveyance was valid, and that a court of equity would not at the instance of Jeptha Fowlkes set up a trust in his favor in the land against Sterling Fowlkes. The evidence of the fraudulent intent would have repelled Jeptha Fowlkes from the court. No trust could be raised in his favor out of such a transaction. A court of equity would have left the parties where it found them. This being so, a purchaser at execution sale of the property, as the property of Sterling Fowlkes, would get a good title as against Jeptha Fowlkes and those claiming as his heirs or devisees, whatever might be the rights of his creditors. Mrs. Fowlkes has shown no title in herself, either as heir or devisee of Jeptha Fowlkes; and the effort is to defeat this action of ejectment by showing an outstanding equitable estate in the heirs of Jeptha Faulkes, upon evidence which we think fails to establish any such equity.

2. It is next objected that the recitals of the sheriff's deed are not sustained by proof, especially as to the levy of an execution, and sale. The judgment was produced, but the execution was shown to have been lost. It is shown that an execution issued, and the execution docketed shows that it was returned levied on land, but no description of the land is given. Sterling Fowlkes proves, however, that he gave in this land to the sheriff to be levied on for the satisfaction of the Barnard judgment, and that he confessed a judgment in favor of Jeptha Fowlkes to enable him to redeem the land from Barnard, who was the purchaser at the sale. Recitals of a sheriff's deed have been held as against third persons to be *prima facie* sufficient: Trotter v. Nelson, 1 Swan 7, 13; Bartlett v. Watson, 3 Sneed, 288; Henderson v. Gallaway, 8 Hum. 692. In this case Mrs. Fowlkes, although she is styled executrix of Jeptha Fowlkes, deceased, is not shown to have any connection with the title of Jeptha Fowlkes. It does not even appear that she is his widow or executrix, or that he made any will; and she certainly has no connection with the title of Sterling Fowlkes. She standing, therefore, in the attitude of an entire stranger, we hold that the evidence sufficiently supports the sheriff's deed as against her.

On the motion for a new trial the defendants read a deed from Sterling Fowlkes conveying this land to D. C. Wilder and Sarah W. Fowlkes, and also the affidavit of their attorney showing that the reason that the deed was not read on the trial was, that it was supposed to be inoperative for want of a seal, they believing that the statute dispensing with seals was not passed until after this deed was executed, but afterwards discovered that in this they were mistaken. This would be no ground for a new trial. Besides, the levy of the plaintiffs' execution was before the registration of this deed.

Let the judgment be affirmed.

NOTE.—Fraudulent conveyances were always binding upon the grantor and all those claiming under him (Robts. on Fraud. Conv. 641), the Statutes of 13 and 27 Eliz. having altered the law only in favor of creditors and purchasers for value. Roberts on Fraud. Conv. 643, 646.

So it has been frequently held, that an executed conveyance of property, made by the fraud of the grantor, is good as against himself (Byrd v. Curlin, 1 Hum. 466), against parties claiming under him (Neely v. Wood, 10 Yerg. 486), and against a subsequent purchaser from him (Mosely v. Mosely, 15 N. Y. 334; Hubbs v. Brockwell, 3 Sneed, 574), and passes title as against his personal representatives (Moody v. Fry, 3 Hum. 567), even though the personal representative claim the right to impeach the conveyance on behalf of creditors, the estate being insolvent (Lassiter v. Cole, 8 Hum. 621). But this rule is restricted to executed conveyances, and does not apply to executory agreements. Nellis v. Clark, 20 Wend. 24; 4 Hill, 424. A court of equity repels parties who claim under a fraudulent conveyance. Searcy v. Carter, 4 Sneed, 271; Bump on Fraud. Conv., p. 446, citing cases. But by statute, in New York, executors and administrators, who formerly could not impeach the fraudulent conveyances of their decedents, may now do so. Bate v. Graham, 11 N. Y. 237; Mosely v. Mosely, *supra*. And similar statutes have been enacted in several other states, changing the general rule.

A fraudulent transfer of goods being valid as against the grantor, his heirs, executors, administrators, agents, vendees and subsequent grantees (Bump on Fraud. Conv. 443; Bishop's Burrill, sec. 354), it follows that an execution against the grantee will pass a good title as against the grantor.

So it was held in Massachusetts, in the early case of Gibbs v. Chase, 10 Mass. 125 (1813). A quantity of timber was seized by process at the suit of creditors of the fraudulent vendee, and their superior claim was sustained, the court saying: "If in Ordway's possession as his property, by an actual transfer from Robbins, however fraudulent as to his creditors, after an actual seizure by Ordway's creditor, the property was not to be reclaimed." So, in Robinson v. Monjoy, 2 Halst. (N. J.) 173 (1824), in ejectment, the plaintiff claimed under a sale *in invitum* of the land as the property of A., whose title came from the defendants, by a sale which they offered proof to show was fraudulent; but this furnished no valid defense. Wright v. Howell, 25 Io. 288, holds that the Statutes of 13 and 27 Eliz. both apply to such cases, and sustains the lien of a creditor by execution against a grantee under a fraudulent conveyance, and his title accruing thereunder, as against a purchaser from the grantor. In Danbury v. Robinson, 1 McCarter (N. J.), 213, a *bona fide* purchaser of a mortgage, fraudulent in its inception, was allowed to prevail in a contest with creditors of the fraudulent mortgagor.

The case of Robertson v. Anderson, 3 Johns. Ch. 371, furnishes an interesting discussion of the principles applicable to these cases under the statutes 13 and 27 Eliz. Chancellor Kent there distinguished between the respective effects of these two statutes, holding that while, under 27 Eliz. the *bona fide* purchaser from a fraudulent vendee would get a good title, it was otherwise under 13 Eliz., the provisions of the latter statute making the conveyance *utterly void*, so that there would be in the fraudulent vendee no title which he could convey to a purchaser. But this was reversed in the court of errors (Anderson v. Roberts, 18 Johns. 515), where it was held that both statutes have equal effect in New York, and render such a conveyance voidable only, and not void, whether the purchase be made from the fraudulent grantor or the fraudulent grantee. And this is stated by Kent, in his Commentaries (on the authority of that, among other cases), to be now "the settled American doctrine" (vol. 4, p. 464).

Booth v. Bunce, 24 N. Y. 392, s. c. 33 N. Y. 139, presents some singular features. The fraudulent conveyance was from an insolvent firm to a corporation created for the express purpose of defrauding the creditors of the firm. A contest arose between creditors of the insolvent firm and creditors of the corporation, over property thus fraudulently transferred. Both parties were judgment creditors; but in this case the creditors of the grantor had the prior levy and sale under their judgment; and so they prevailed, under the application of the maxim, "*Qui prior est in tempore, potior est in jure.*"

This principle, that the creditors of both parties stand upon the same level, and that any contest between them is but a race of diligence, was applied to the contrary case of a prior seizure by the creditors of the fraudulent grantee, by Mr. Chancellor Cooper, in Parker v. Freeman, 3 Central L. J. 510, and such is now, no doubt, the settled American doctrine.

J. O. P.

THE *Somerset* (N. J.) *Gazette* says: "It is funny what queer oaths some officials must take; and rather strange, indeed, that some things have to be sworn to over and over again. For instance, it is humorous that the dog men of New York—those who catch the poodles and pointers and everlasting setters—must take such an oath as this: 'I, ——, do solemnly swear that I *will support the Constitution of the United States* and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of dog officer for the district No. ——, of the city of New York, according to the best of my ability.' Just what the Constitution of the United States has to do with a dog-catcher is not very patent."

TITLE UNDER FRAUDULENT SALE—ADVERSE JUDICIAL PROCEEDINGS.

DICKSON v. CULP.

Supreme Court of Tennessee, September Term, 1876.

HON. JAMES W. DEADERICK, Chief Justice.
" PETER TURNEY,
" THOS. J. FREEMAN,
" ROBERT MCFARLAND,
" J. L. T. SNEED, } Associate Justices.

1. FRAUDULENT SALE—TITLE IN VENDEE.—A sale of goods procured by the fraud of the vendee passes the title to him, subject to the right of the vendor to avoid the sale for the fraud; the sale is voidable, not void.

2. ADVERSE TITLE.—If the goods be seized as the property of the vendee, by valid judicial proceedings, a *bona fide* purchaser under such proceedings will acquire a title superior to the rights of the original vendor to avoid his sale, and the plaintiff in such proceedings will acquire a like superior right to the proceeds of the sale.

MC FARLAND, J., delivered the opinion of the court.

The argument for the complainants is earnest and plausible, but we are of opinion that the decree of the chancellor is right. After the sale by the complainants to Watson, Culp caused the goods to be attached in an attachment proceeding instituted by him against Watson; and, under orders, which we must presume to have been proper, nothing else appearing, they were sold, to whom does not appear, but it does appear that they were not purchased by Culp. All this without any fraud or collusion upon the part of Culp, or any knowledge upon his part of the fraud of Watson in the original purchase. After this, the complainants file this bill, in which they charge that Watson procured them to sell him the goods by fraud; and it is insisted that they are entitled to the proceeds of the sale of the goods, which were still under the control of the court at the filing of the bill. The facts, as to the precise attitude of Culp's attachment proceeding are very imperfectly stated, in fact nothing else appearing than as above stated. Admitting that the complainants have the right to avoid their sale to Watson, and recover the goods from him, or from any one to whom he might have transferred them for a pre-existing debt, or that they might recover the proceeds of the goods from Watson, or any one to whom the proceeds had been transferred without paying any new consideration therefor,—that is, for a pre-existing debt,—still we think the complainants can not recover. Culp's proceeding was rightfully instituted. The title to the goods when attached was in Watson. The sale was valid, and passed the title, and the purchaser now holds them, as is not denied; at least no effort is made to recover the goods of the purchaser or purchasers. They are not made parties. This being so, it seems to us that it necessarily follows that the proceeds of the sale can not now be taken from Culp, assuming that he is entitled to such proceeds as against Watson. His rights were fixed by the institution of his suit and the levy of his attachment, and must be adjudged upon the state of the case then existing.

The complainants' contract with Watson was only avoided upon the filing of their bill. This did not relate back so as to release or avoid the effects of the levy under Culp's attachment, or the sale thereunder. In other words, to hold for the complainant would be to hold that Culp's proceeding was rightfully instituted, his attachment properly levied upon goods of his debtor Watson, the sale regularly made passing the title—but that he shall not receive the fruits of his latigation, that the proceeds shall be given to the complainants, whose title to the property is conceded to be lost by virtue of Culp's proceeding, and yet Culp be turned out of court to pay the costs and expenses of this litigation. It seems to us that, if we hold that if the proceeds of the sale of these goods may now be given to the complainants in disregard of the rights of Culp, it would also follow that the complainants would be entitled to recover the money from Culp, even though it had been paid to him under the decree of the court. His rights do not depend upon the date of the decree or judgment in his favor; but his rights are fixed by the institution of his suit and levy of his attachment. Of course it would be different if the property attached were taken by a superior title. Had Culp purchased these goods from Watson for a pre-existing debt, the complainants might have recovered the goods. This would have left Culp in no worse attitude than before; but, now, to take the proceeds from him, would leave him to pay his costs and counsel fees. Culp's rights here depend not upon a purchase from Watson, but upon the effect of judicial proceedings rightfully instituted. It has been held that, where property has been transferred with intent to hinder and delay creditors, the creditors of the fraudulent vendee, not participating in the fraud, may, by first causing the property to be taken in execution against the fraudulent vendee, acquire superior rights to the creditors of the fraudulent vendor. The principle here is analogous to some extent, the difference being that here the complainants sold the goods to the debtor. But the complainants here, as well as the creditors of the fraudulent vendor in the case referred to, each sucw to predicate their right upon avoiding a contract, which, as to themselves, they had the right to avoid, but before they had done so the creditors of the debtors and fraudulent purchaser had siezed the goods by execution or attachment.

Again, Watson held the title to the goods at the time they were attached, subject, it may be, to be defeated at the election of complainants; but until this election was made, his title was clear. This was certainly a title which might be attached and sold, the purchaser would certainly get the title Watson had. If we even conceded that the purchaser took this title subject to be defeated at the election of complainants, it was still good for the time, and might never be defeated. The purchaser, in this view, would purchase at his own risk; and, in this view, the attaching creditor would be clearly entitled to the proceeds, and the complainants' right, if any, would be to recover the goods, and not the proceeds of their sale.

Decree affirmed, with costs.

NOTE.—A sale of goods made absolute in the first instance, though induced by the fraudulent conduct of the purchaser, passes to him a good title, which he may in turn transfer to a *bona fide* purchaser for a valuable consideration (Mowry v. Walsh, 8 Cowen, 238; Paddon v. Taylor, 44 N. Y. 371; Barnard v. Campbell, 65 Barb. 286); even though the delivery of the goods to the fraudulent vendee may have been conditional. Smith v. Lynes, 5 N. Y. 46. This follows from the rule now established, that as between vendor and vendee the sale was voidable, not void. Paddon v. Taylor, *supra;* Benjamin on Sales, § 433.

But the vendor who has been thus defrauded may, at his option, rescind the sale and recover the goods from the fraudulent purchaser (Cary v. Hotaling, 1 Hill, 311; Earl of Bristol v. Wilsmore, 1 Barn. & Cres. 514; Allison v. Mathieu, 3 Johns. 238; Buffington v. Gerrish, 15 Mass. 156); or from a purchaser from the vendee, if he have not purchased *bona fide*. Root v. French, 13 Wend. 570. In some of these cases it is said that under such circumstances the sale is, at the option of the vendor, *void* for the fraud. This may be a mere carelessness of expression. As stated in Anderson v. Roberts, 18 Johns. 515, courts have frequently said "void" when they really meant only "voidable." Probably the rule laid down by Mr. Benjamin, *supra*, is the correct one. But be this as it may, there

is no doubt that the vendor's right of rescission is now well established and unquestionable.

But where, as in the principal case, the title of the fraudulent vendee has been subject to adverse proceedings by his creditors, what rule applies? In the case of Fowlkes v. Harris, *supra*, the right of an execution or attachment creditor of a fraudulent vendee is sustained as against a fraudulent vendor; and the learned judge, who delivered the opinions in both cases, considered the principle of the former case to some extent applicable to the one now under consideration. But the courts have not generally considered these two classes of cases as analogous. It has most commonly been held that a *bona fide* vendor, who has been defrauded in the sale, is not affected by mere levies or attachments upon the property at the instance of the vendee's creditors, when such liens have not ripened into titles by judicial sale.

Thus, in Buffington v. Gerrish, 15 Mass. 156, a sale of goods procured by fraud was held void at the suit of the vendor, as against the attaching creditors of the vendee. The court held that the goods had never become the property of the vendee, and that "he had done no act by which any of his creditors had been deceived with respect to this property, for their debts all existed before he acquired the possession." This ruling was followed in Wiggin v. Day, 9 Gray, 97; Ayers v. Hewett, 19 Me. 281; Bussing v. Rice, 2 Cush. 48; Acker v. Campbell, 23 Wend. 372; Bradley v. Obear, 10 N. H. 477, and Thompson v. Rose, 16 Conn. 71; the last named being a full and well-considered opinion. In all these cases, as in others to be named below, the question was raised *in limine*, by an assertion of the vendor's title to the specific goods while in the hands of the officer. It was intimated in Hussey v. Thornton, 4 Mass. 405, and Gilbert v. Hudson, 4 Greenl. 345, that if the demands of the vendee's creditors had accrued after he had acquired, and while he held the goods, so that there would be a fair presumption of credit given on the faith of such goods, the vendor would lose, and the attaching creditor might hold the goods; and this distinction was hinted at in the foregoing quotation from Buffington v. Gerrish. But it is difficult to see how any such distinction could be maintained in a court of law, in view of the fundamental principle already noticed in many of the cases, that the fraudulent vendee had, under the circumstances, acquired no property in the goods.

Jordan v. Parker, 56 Me. 557, following Buffington v. Gerrish, and other like cases, furnished the more explicit and satisfactory reason that the attaching creditor represents the rights of only the fraudulent vendee, and can take no higher ground than he might occupy. Poor v. Woodburn, 25 Vt. 234, applies the same cogent reasoning, both to a sheriff holding part of the disputed goods by attachment and an assignee holding the remainder under an assignment to secure creditors. So in Bussing v. Rice, 2 Cush. 48, the like reasoning governs the case of goods in the hands of a messenger in insolvency, who is put upon the exact footing of an officer holding under an attachment. And Field v. Stearns, 42 Vt. 106, has the same argument in its support, the goods there being replevied from the sheriff who had seized them.

Atwood v. Dearborn, 1 Allen, 483, seems an extreme and not well considered case. The plaintiff recovered in tort from the sheriff the value of the goods which he had seized as the property of the fraudulent vendee. There was no proof that the sheriff knew of or had participated in the fraud; and the court refused to rule that the attaching creditor must know of the fraud to be affected by it. It does not appear whether the goods had been sold, or what disposition had been made of them; and the case is thus distinguished from all those where the goods were specifically recovered. The court held briefly, "where goods are obtained by fraud, the vendor may claim them against all persons except a *bona fide* purchaser without notice; an officer who takes them in behalf of creditors by legal process does not come within the exception." But, *quære*, why should the officer be held individually responsible for the goods, by levying on them in good faith, and without notice of adverse claims? The court refers to Rowley v. Bigelow, 12 Pick. 312, as an authority; but that was simply a case were the title of a *bona fide* purchaser from the fraudulent vendee was sustained, like Mowrey v. Walsh, *supra*. In Root v. French, 13 Wend. 570, it was intimated that the title of a *bona fide* purchaser would in like manner have been held good; but the purchaser there was not within that description, and his title failed

The precise question in the principal case seems to have been but seldom before the courts; but there is scarcely anything to militate against the conclusion of the Tennessee court, that after the lien of the execution or the attachment against the fraudulent vendee has ripened into a judicial sale, it is too late for the defrauded vendor to recover either the goods from a *bona fide* purchaser, or the proceeds of them from a *bona fide* attachment or execution creditor. The question is ignored in Earl of Bristol v. Wilsmore, 1 Barn. & C. 514, the decision of which is broad enough to cover it if it had been considered. In Fields v. Stearns, 42 Vt. 112, it was said that the attachment against the vendee, "if followed up and perfected by a sale, might ordinarily pass the title." This was *obiter*, the goods in that case having been replevied from the sheriff. But this would seem to follow as a fair inference from all the preceding cases, for after a *bona fide* judicial sale, it can no longer be said that the goods are held by the same title the vendee had formerly possessed, or that the purchaser stands in the fraudulent vendee's shoes. The case of Devoe v. Brandt, 53 N. Y. 462, though apparently an adverse case, is hardly so upon close inspection. We think it plain in that case that the court, by reason of certain suspicious circumstances, intended to put Brandt, who had bought the goods at his own sale as the property of the fraudulent vendee, out of the category of *bona fide* purchasers. The language of the opinion is: "It is only necessary to decide in this case that Brandt, the execution-creditor, does not become a *bona fide* purchaser by buying goods, at a sale thereof, which were fraudulently purchased by the defendant in that execution. That proceeding gave him no better title than a mere delivery would from the fraudulent vendee. He advanced nothing, and he lost nothing by the proceeding."

It may be noted that certain cases have held that the rights of creditors under the Stat. 13 Eliz., to set aside fraudulent conveyances, extend only to the property itself, and do not extend to the proceeds of the sale of such property. Simpson v. Simpson, 7 Hum. 275; Tubb v. Williams 7 Hum. 367; Richards v. Ewing, 11 Hum. 327. J. O. P.

NEGOTIABLE INSTRUMENTS.

SEATON v. SCOVILLE *ET AL.*

Supreme Court of Kansas, July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

1. A NOTE NOT NON-NEGOTIABLE BY THE ADDITION OF AN ATTORNEY'S FEE.—A note, otherwise negotiable, is not rendered non-negotiable by the addition of a stipulation to pay costs of collecting, including reasonable attorney's fees, if suit be instituted thereon. Such a stipulation does not affect the certainty of amount, requisite in negotiable paper, due at maturity, and only creates an uncertainty in amount which, in case of non-payment after maturity and after the element of negotiability has ceased, and in event of suit brought, may be recovered therein.

2. PROTEST AND SERVICE OF NOTICE THEREOF.—It is incumbent upon a party seeking to charge an indorser to prove a legal notice, but this, like any other question of fact, is to be settled upon the testimony as it is given, and need not be proved beyond the possibility of mistake. Where the holder and the party to whom notice is to be given reside at different places, it is generally sufficient if notice is sent by the mail of the day next succeeding the day of dishonor.

3. DISHONORED PAPER—TO WHOM HOLDER OF, MAY GIVE NOTICE.—The holder of dishonored paper may give notice directly to all prior parties, or only to his immediate predecessor on the paper. In the latter case, such predecessor has the same time to give notice to his indorser as though he himself had been the holder and had the paper protested. A banker or agent, to whom paper has been transmitted for the purpose of obtaining acceptance or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder and his principal a prior indorser. A note, payable in Topeka, was, on August 5, legally protested there, and notice thereof forwarded by mail by the banker, who held the note for collection, to the owners at Fort Scott. Notice, when received, was sent by them by mail to the indorser at Atchi-

son. It took a letter two days to go by mail from Topeka to Fort Scott, and two days to go in like manner from Fort Scott to Atchison. The indorser received the notice on August 10; the 9th was Sunday. *Held*, that a finding that legal notice had been given must be sustained, although it appeared that there was a daily mail between Topeka and Atchison, and that all parties except the notary knew where the indorser resided, and although it was not shown at what exact hour the notice was deposited in the post-office at Topeka or at Fort Scott, or received by the owners or the indorser, or what hours the mail left Topeka or Fort Scott, or reached Fort Scott or Atchison.

PLEADINGS—SUIT BY AN ASSIGNEE IN BANKRUPTCY IN A STATE COURT.—4. Where a petition alleges that plaintiffs are the assignees in bankruptcy of a corporation, and have full authority to prosecute and maintain this action; that the defendant indorsed the note sued on to them as such assigns, giving copy of the indorsement, and that they are now the holders and owners thereof, and these allegations are not challenged by motion or answer; *held*, that a judgment in favor of the plaintiffs would not be reversed because the petition failed to allege any indebtedness of the indorser to the corporation, or any special authority from the bankrupt court to the assignees to discount notes, etc.

ERROR from the District Court of Atchison County.

David Martin, for plaintiff in error; *B. P. Waggener*, for defendant in error.

BREWER, J., delivered the opinion of the court:

This was an action upon the following note:

"$250.00. TOPEKA, KAN., June 24, 1874.

"Thirty-nine days after date we promise to pay to the order of John Seaton, at the Topeka Bank and Savings Institution, Topeka, Kansas, two hundred and fifty dollars, with interest at twelve per cent. per annum after due until paid; *also costs of collecting, including reasonable attorney's fees, if suit be instituted on this note. Value received.*

"Topeka Rolling Mill Co., by

"R. D. COLDREN, President."

And the first question presented is, whether this was a negotiable note; and the claim is, that because of the stipulation for payment of costs of collection and attorney's fees, the amount due on the paper is uncertain, while both the common law and the statute define negotiable paper as drawn for a "sum or sums of money certain." Story on Prom. Notes, sec. 1; Gen. Stats., sec. 1, p. 114. This claim can not be sustained. The amount due at the maturity of the paper is certain, and the only uncertainty is in the amount which shall be collectable in case the maker defaults at the maturity of the paper in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection. In the case of Sperry v. Harr, 32 Io. 184, the stipulation in the note was: "If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor," and the note was held to be negotiable. The court say, in the opinion: "The agreement for the payment of attorney's fees in no sense increased the amount of money which was payable when the note fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection, than to the sum which the maker is bound to pay. It is not different in character from a cognovit, which, when attached to promissory notes, does not destroy their negotiability."

The same proposition is affirmed in Carr *et al.* v. Louisville Bank Co., 11 Bush. (Ky.) 180, in which the court declares that "the reason for the rule, that the amount to be paid must be fixed and certain, is that the aper is to become a substitute for money, and this it can not be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated negotiability, or to perform the office of money, and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, can not prevent its becoming negotiable paper." Dietrich v. Baylie, 23 La. Ann. 767; Stoneman v. Pyle, 35 Ind. 103. That it is no longer an open question in the latter state, is evident from the cases of Wyant v. Pottorf, 37 Ind. 512, and Walker v. Woollen *et al.*, 4 Cent. L. J. 248. See, also, Dinsmore v. Duncan *et al.*, 57 N. Y. 573, and Zimmerman v. Anderson, 67 Pa. State, 421, in which last case a stipulation waiving appraisement, stay of execution, etc., was held not to affect the negotiability of the paper; Bradley v. Lill, 4 Bissell, 473, in which the promise was to pay a certain amount with exchange, and the amount of the exchange not stated, and still it was held to be negotiable. And on the same point, see Smith v. Kendall, 9 Mich. 241; Johnson v. Frisbie, 15 Mich. 286; Leggett v. Jones, 10 Wis. 34; Gutacap v. Woulwise, 2 McLean, 581; *contra*, Bank v. Gay, 63 Mo. 33; Samstag v. Conly *et al.*, 5 Cent. L. J. 29. It seems to us, however, a just conclusion that paper, otherwise negotiable, is not rendered non-negotiable by a stipulation for the payment of costs of collection, including attorney fees, in case suit is brought thereon.

A second proposition of plaintiff in error is, that if the note be considered negotiable, notice of non-payment was not given within a reasonable time so as to charge the indorser. The evidence upon this point showed that the protest was made August 5, 1874, and that the said John Seaton did not receive notice thereof until August 10, 1874; that said John Seaton resided in Atchison, Kansas, within the knowledge of all the parties except the notary at Topeka making protest, and was in business and attended the post-office two or three times every day; that Atchison was and is the terminus of the Atchison, Topeka and Santa Fe Railroad, a daily mail route, and is also the terminus of the Missouri Pacific or Atlantic and Pacific Railroad, a daily mail route; that Topeka is situated on said Atchison, Topeka and Santa Fe Railroad, fifty miles from Atchison; that the notice to said John Seaton was transmitted in the same envelope with the certificate of protest to the plaintiff at Fort Scott, where they resided, and said notice was sent by the plaintiff to the said John Seaton, and that it took two days for a letter to go by mail from Topeka to Fort Scott, and two days from Fort Scott to Atchison, Kansas, and the said note was placed in a Topeka bank, at Topeka, Kansas, for collection and protest if not paid when due, and was in said bank when so due, and after protest was returned to plaintiffs at Fort Scott, Kansas.

No question is made upon the protest, providing the note was negotiable. Upon this we remark that it rests upon the party seeking to charge an indorser to prove a legal notice. No presumptions arise in his favor. It is a question of fact, and the *onus probandi* is upon him. But, like any other question of fact, it is to be settled upon the testimony as it is given, and need not be proved beyond the possibility of mistake. A reasonable construction must be given to the testimony, and reasonable inferences may be drawn from it. And if, from this, it appears that legal notice was given, it will be sufficient, although it at the same time appears that further testimony, more full, explicit and definite, might possibly show an unwarrantable delay on the part of some one of the various parties. We are not to presume facts that are not proven, and we may rest

upon the testimony given and any reasonable inferences to be drawn from it.

We remark again that where the holder and the party to whom notice is to be given reside at different places it is generally sufficient if notice is sent by the mail of the day next succeeding the day of dishonor. Williams v. Smith, 2 B. & Ald. 501; Bray v. Hadmen, 5 Maule & Selwyn, 68; Bank of Alexandria v. Swan, 9 Peters, 33. It is sometimes said that it must go by the next practicable mail, and, on the other hand, where the mail of the next succeeding day starts at an unseasonable hour, it will be sufficient if it is deposited in the post office at any time on that day so as to be ready for the mail of the succeeding day. Our statute says "within a reasonable time." Gen. Stat., p. 115. sec. 7. What is a reasonable time is generally a question of law for the courts. Byles on Bills, marginal p. 322, and cases in note. 2 Greenl. on Ev., sec. 186. We are not in this case advised as to the hour of the departure of the mail from Topeka for Fort Scott, or from Fort Scott for Atchison, and so no question of seasonableness or unseasonableness of such hour is before us. We can, then, only fall back upon the general rule that the notice must be deposited in the post office in time for the mail of the next succeeding day. In other words, the protest having been on the 5th, the notice must have left Topeka in the mail of the 6th, or at least been deposited in the post office in time for such mail. Again, the holder of protested paper is not obliged to give notice to all prior parties—he may simply give notice to his immediate predecessor on the paper, and then such predecessor has the same time in which to notify his predecessor, and so on. So that where there are many parties to dishonored paper, the first indorser may not receive notice of the dishonor for weeks or months thereafter, and that too, although all the parties reside in the same vicinity. In the case before us it is entirely immaterial whether the notary did or did not know of the residence of John Seaton, or whether said Seaton resided nearer to Topeka than Fort Scott, the residence of plaintiffs. Eagle Bank v. Hathaway, 5 Metc. 212; Triplett v. Hunt, 3 Dana, 128; Farmer v. Rand, 4 Shep. 453; 3 Kent's Com., side p. 106, and note; 2 Greenl. on Ev. sec. 187; 1 Parsons on Notes and Bills, 513. And again, a banker or agent to whom the paper has been transmitted for the purpose of obtaining acceptance or payment, is, so far as the question of notice is concerned, to be considered as though he were the real holder and his principal a prior endorser. He may notify only his principal, and such principal has the same amount of time in which to give notice to prior parties. 1 Am. Leading Cases, side p. 394; 2 Greenl. on Ev., sec. 187a; Byles on Bills, side p. 224.

Now, applying these principles to the case, and it was proper for the notary at Topeka to forward notices to plaintiffs at Fort Scott, without mailing any directly to Seaton at Atchison, and whether he did or did not know of Seaton's place of residence. Notice leaving Topeka by the mail of the 6th, would reach Fort Scott on the 7th; leaving Fort Scott on the 8th, would reach Atchison on the 9th. It was received by Seaton on the 10th. But the 9th was Sunday, so that he received it on the very day that he should have received it, going by the first mail and in the usual time. It is true that the testimony fails to disclose the exact hours at which the notice was mailed at Topeka, or at Fort Scott, or of the departure of the mails from those places, or of the arrival of the mails at Fort Scott or Atchison, or the receipt of the notice by plaintiffs or Seaton, and if all these facts were disclosed it might possibly appear that there was, either on the part of the notary at Topeka or of the plaintiffs at Fort Scott, such a delay in forwarding notice as would discharge the endorser. But upon the testimony as it stands we think there was no error in the finding that due diligence had been used in giving notice. 1 Parsons on Notes and Bills, 517, and cases cited in note.

A final proposition of the learned counsel for plaintiff in error is, that "neither the pleadings nor the proofs show any right of the plaintiffs below to recover against Mr. Seaton." The petition alleges that plaintiffs are the assignees in bankruptcy of the Fort Scott Coal and Mining Company; that they have full power and authority to prosecute this action; and that John Seaton endorsed and transferred to plaintiffs said note, giving copy of endorsement, and that they are now the holders and owners thereof. No denial is made of these allegations. It is said by counsel that it does not appear that Seaton was ever indebted to the coal company, and that assignees in bankruptcy have no general power or authority to discount notes, etc., in behalf of their estates, and that no special authority from the bankrupt court is alleged. It is unnecessary to enquire whether the petition could not have been attacked by motion, or the authority of plaintiffs challenged by answer. Nothing of the kind was attempted. The defendant was content to go into trial upon the admission, by failure to deny that plaintiffs were the owners and holders of the paper, that they acquired title to it by endorsement to them, and that they had full authority to prosecute and maintain this action. As they could not be the owners and holders without having authority to receive title by the endorsement, and as it is not questioned but that, under some circumstances, they could legally take title to such paper, we think the general allegations of the petition, unchallenged by motion, answer or evidence, are sufficient to sustain the judgment.

Upon the whole record we see no error, and the judgment will be affirmed.

NOTE.—The late decisions of the Supreme Court of Missouri of Bank v. Gay, 3 Cent. L. J. 465, and Samstag v. Conly *et al.*, 5 Cent L. J. 29, in conflict with the above case of Seaton v. Scoville *et al.*, are well calculated to surprise the profession, and especially must this be the result if these case are followed by other courts. To me, these decisions are neither sustained by authority nor reason. The importance of these decisions renders the question a matter of serious consideration. The notes so held by the Supreme Court of Missouri as non-negotiable, are very familiar in form to the people of the western states, and such decisions may well be denominated as "sapping the very foundation of credit." In support of Bank v. Gay, the court cites the following authorities: Ayrey v. Fearnsides, 4 M. & W. 168; Smith v. Nightingale, 2 Stark. 330; Clark v. Percival, 2 B. & Ad. 660; Bolton v. Dugdale, 4 B. & Ad. 619; Read v. McNulty, 12 Rich. 445; 1 Pars. N. & B. 37; Smith Merc. Law, 263; and then disposes of the cases sustaining the negotiability of this character of paper with the remark that "they regard them as seriously endangering elementary principles and definitions."

A review of the cases will therefore be necessary to ascertain their effect, and, under the circumstances, not time uselessly consumed. I may premise, that the rule of the law merchant undoubtedly is, that it is an indispensable quality of a note or bill that it shall be for a definite sum in order that it may be negotiable. But the question at issue is, whether the negotiability of a written instrument in form of a note or bill is destroyed by an agreement that the parties will pay an attorney's fee if the sum be not paid at maturity of such bill or note, and the note is placed in the hands of an attorney for collection, or if the said bill or note is not paid at maturity and the debt has to be sued for?

In Ayrey v. Fearnsides it was held, where the instrument contained the words, "and all fines according to rule," that, as the words could not be rejected as being altogether insensible, and might import that certain pecuniary fines or forfeitures were to be paid, the instrument could not be declared on as a promissory note.

In Smith v. Nightingale it was held that, where the instrument by which a party promised to pay £65, and also

such other sum as by reference to his books he owed to another, with interest, could not be considered as a promissory note. Lord Ellenborough was of the opinion in the case, "that the instrument was too indefinite to be considered as a promissory note, as it contained a promise to pay interest for a sum not specified, and not otherwise ascertained than by reference to defendant's books, and that since the whole constituted one entire promise, it could not be divided into parts."

In Clark v. Percival it was held that, A. having given his daughter, on her marriage, the stock of a public house, amounting in value to £1200, she and her husband signed the following instrument: "On demand we promise to pay to A. or his order £1200, for value received in stock, etc., this being intended to stand against M. (the daughter) as a set-off for that sum left in my father's will above my sister Ann's share," that such a writing was not a promissory note. In the opinion of Parke, J., it was stated, "that this note was not intended as a promise to pay the sum mentioned in it, but was only a memorandum of such a sum having been received as a satisfaction *pro tanto* of the intended legacy."

In Bolton v. Dugdale it was held that the following instrument was not a promissory note, viz: "Received and borrowed of C. B. £30, which I promise to pay with interest at the rate of 5 per cent. I also promise to pay the demands of the Sick Club at H. in part of interest, and the remaining stock and interest to be paid on demand to the said C. B." In this case, the amount of the Sick Club charges was uncertain, and so, therefore, was the sum to be paid. And again, it seems to have been suggested that the maker of the instrument could not have been obliged to pay the interest in any other way than to the Sick Club.

In Read v. McNulty it was held that a promise in writing to pay a certain sum of money to A. or order, at a certain time and place, "with exchange on New York," was not a promissory note within the Statute of Anne.

Johnston, J., in this opinion said, "that where terms are added obliging the party to pay 'with exchange on New York,' which is not constantly fixed by law, but fluctuates from day to day with changes of commerce, it is equivalent to saying that that is a good note of hand which imports a promise to pay one sum to-day and another to-morrow."

The citations from Smith's Merc. Law, and 1 Pars. on N. & B., are only to the general principle that there should be entire certainty and precision as to the amount to be paid in a written promise to make it a promissory note.

Now, in my view, none of these cases go so far as the decisions of Bank v. Gay, and Samstag v. Conly *et al.*, *supra*. These decisions seem to me to endeavor to make the law enforce the certainty of the amount in such a senseless and technical way as to embarrass the transactions of business, particularly in those states where no taxable costs for attorneys are authorized by law. The conceded reason for requiring that the amount named in a promissory note must be certain, is, as the note is to represent money effectually, there must be no chance of mistake as to the amount of money of which it thus takes the place and performs the office. We can not see how the note in Bank v. Gay violates this rule. The sum payable by the terms of the note to the payee or order is fixed and certain, and it really possesses all the requisites of a negotiable instrument. If it be contended that the condition in the note as to the costs of collection, after the note is dishonored, is such an agreement engrafted on the note, that, considered as one transaction, the note fails of its negotiability, then I answer, that the decision of the Supreme Court of the United States in Carpenter v. Longan, 16 Wall. 271, and the many authorities of the state courts, to the effect, that when a mortgage given at the same time with the execution of a note, and to secure payment of it, is subsequently, but before the maturity of the note, transferred *bona fide* for value, with the note, the holder of the note, when obliged to resort to the mortgage, is unaffected by any equities arising between the mortgagor and mortgagee subsequently to the transfer, and of which he, the assignee, had no notice at the time it was made, are erroneous. The mortgage is, in such a case, also, virtually a condition engrafted on the note, or rather a part thereof. Neither, in my view, is it against public policy, or inequitable, in those states where no fees are allowed as taxable costs for attorneys, to compel A., who has borrowed of B. $100 on ninety days, to pay the attorney's fees which B. incurs, when compelled to place the note given therefor in the hands of an attorney to collect on account of the refusal of A. to meet the note at maturity, or to pay the same. Upon what system of equity or good morals should B. be compelled to pay from his own funds the sum of five or ten dollars to collect his money from A., who disregards his written promise?

In addition to the case of Seaton v. Scoville *et al.* and the authorities there cited, I also refer to Stewart v. Smith, 28 Ill. 397; Houghton v. Francis, 29 Ill. 241, and Nickerson v. Sheldon, 33 Ill. 372.

In view of the prior decisions in Louisiana, Kentucky, Iowa and Illinois, directly conflicting with the cases of Bank v. Gay and Samstag v. Conly *et al.*, and the many decisions of the courts of other states tending to the same conclusion, and where parties, upon the faith of such reported adjudications, have acted and entered into written contracts, it is exceedingly unfortunate that any court has felt itself forced to arrive at a different conclusion, and thus render invalid thousands of dollars of contracts so long upheld by judicial decisions. If our state courts differ so widely upon questions that ought to be so simple and plain as this, it is not strange that refuge and protection are sought for in the federal tribunals. Such conflicting decisions as these will soon reduce the state courts to the position in which they were placed by a Kansas lawyer recently, who, in arguing a case in the U. S. Circuit Court of this district, denominated them as "police courts, with $500 jurisdiction." Upon the many authorities in this country holding that a note otherwise negotiable is not rendered non-negotiable by the addition of a stipulation to pay costs of collection, if suit be instituted thereon, it would have been more in consonance with justice and fair dealing if all the courts should observe the remark of Comstock, J., in Church v. Brown, 21 N. Y. 335, to the effect that "when the rules laid down by the courts become the laws which sustain titles and contracts, they are, in general, to be sacredly adhered to."

LEX.

CORRESPONDENCE.

A KNOTTY QUESTION SOLVED.

To the Editor of the Central Law Journal:

I propose the following solution of the very novel case stated in your issue of 20th July, wherein a man died in Massachusetts, leaving a will whereby he gave one-third of his property to his widow, one-third to his then living child, and one-third to an unborn child, whereof his wife was *enciente*, which, upon birth, after the testator's death, proved to be *twins*.

Now, the gift to the unborn *child* could not be construed to embrace *child or children*; for that would satisfy neither the letter nor the obvious intent of the testamentary disposition. The gift, then, of one-third to the unborn child would fail for uncertainty; and the unborn children would have to be treated as *præ termitted;* in which case they would take (we believe), under the Massachusetts statute, the same interests in their father's estate as though he had died intestate; and toward making up their portions, the widow and living child would have to contribute ratably.

JUVENIS.

BOOK NOTICE.

BLATCHFORD C. C., VOL. 13.—Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit. By SAMUEL BLATCHFORD, Judge of the District Court of the United States for the Southern District of New York. New York: Baker, Voorhis & Co. 1877.

The second circuit embraces New York, Vermont and Connecticut. Mr. Justice Hunt (appointed from New York) of the Supreme Court of the United States, is the Circuit Justice. Hon. Lewis B. Woodruff, the first Circuit Judge, died September 10, 1875, and was succeeded by Hon. Alex. S. Johnson, formerly a justice of the Court of Appeals of New York. The district judges for the three districts of New York, respectively, are Samuel Blatchford, William J. Wallace, and Charles L. Benedict; for Vermont, David A. Smalley; and for Connecticut, Nathaniel Shipman.

Since this volume went to press, unless we are mistaken, Judge Smalley has been retired on full pay by a special act of Congress.

This volume contains over 600 pages of matter, printed and bound in the best manner. The decisions reported, evidently selected with great care, cover the two years of 1875 and 1876. The work of the reporter is extremely well done. His head-notes are especially to be commended for their clearness and aptness of statement, and for the fine analytical power which they exhibit.

Our space does not permit us to refer to the numerous interesting cases here reported, but we may call attention to the great number of patent cases—this subject alone occupying ten pages of the index, the topics arranged under appropriate sub-titles.

The appendix also contains a full history of the celebrated case of *Lange*, and of the civil suit against Judge Benedict which grew out of it.

NOTES OF RECENT DECISIONS.

MARRIED WOMAN — BUILDING ASSOCIATION.—*Juniata Building Association v. Mixwell*, Supreme Court of Pennsylvania. 24 Pittsburgh L. J. 203. Opinion by STERRETT, J. A married woman may unite with her husband in executing a valid mortgage to a building association on her separate property, to secure his debt to the association, including premium and fines.

ADMIRALTY — COLLISION — DUTY OF STEAMER AND SAILING VESSEL.—*Marshall v. The Adriatic*, U. S. District Court, Southern Dist. N. Y. 4 Am. L. T. Rep. (N. S.) 353. Opinion by BLATCHFORD, J. Where the vacillation of a sailing vessel in the exhibition of her lights is the cause of a collision with a steamer, the steamer held not to have been in fault, even though the collision might have been avoided if the steamer had adopted a course different from that pursued.

INSURANCE — SEPARATE SUMS — FRAUD AS TO SINGLE SUBJECT OF INSURANCE.—*Moore v. Virginia Fire and Marine Ins. Co.*, Supreme Court of Appeals of Va. 4 Am. L. T. Rep. 369. Opinion *per curiam*. The policy insured separate sums on building, fixtures, and stock, and provided that fraud on the part of the insured should cause a forfeiture of all claim under the policy. *Held*, that a fraud proved in the claim in respect of one of the subjects of insuranee avoided the policy as to all, and that the policy would be avoided by fraud on the part of the insured in making the contract, without any express provision to that effect.

HOMESTEAD — MORTGAGE.—*Gibson v. Mundell*, Supreme Court of Ohio; to appear in 29 Ohio St. 523. Opinion by BOYNTON, J. 1. A mortgage of premises, no part of which constitutes the family homestead of the mortgage-debtor at the time of the execution and delivery of the mortgage, although not executed by the wife, is not affected by the subsequent selection and occupancy of the premises mortgaged, as the homestead of the mortgagor. 2. As against such mortgage, the wife of the mortgage-debtor is not entitled to an assignment of a homestead in the premises mortgaged.

IMPEACHMENT OF JUDGMENTS IN COLLATERAL PROCEEDINGS—DIVORCE.—*Newcomb's Heirs v. Newcomb*, Court of Appeals of Kentucky. 4 Am. L. T. Rep. (N. S.) 341. Opinion by PRYOR, J. 1. While it is well settled that the judgment of a court of general jurisdiction can not be impeached collaterally, if it appear in a collateral proceeding that there was no citation or summons, when there should have been, the judgment will be held to be void. 2. Plaintiff, whose wife was insane and confined in an asylum out of the state, procured a decree of divorce, without summons or citation, in pursuance of the letter of certain statutes which provided that jurisdiction could be obtained by publication. *Held*, that it was competent to show, in a collateral proceeding, that the decree of divorce was obtained without the wife being legally cited to answer, and that, upon proof of the fact, the decree would be treated as null and void.

DOMICILE — UNION OF INTENT AND PRESENCE.—*Stockton v. Staples*, Supreme Court of Maine. 4 Wash. L. R. 237. Opinion by APPLETON, C. J. The domicile of a party in any particular locality is acquired by a union of intent and of presence. The defendant, a shipmaster, left his home in Stockton, in September, 1871, on a voyage, intending to abandon Stockton as his home, and, on his return from sea, to go to Searsport and make it his home thereafter. On his return in June, 1872, he married a resident of Searsport, and remained there a few days, then went to sea with his wife, returned to Searsvport in May, 1874, and left his family there, not having been in Stockton, except on a visit, since 1871. *Held*, in action by Stockton, for taxes for the years 1872-3-4, that from and after June, 1872, when there was a union of intent and of presence in Searsport, his domicile was in Searsport, and not in Stockton.

CRIMINAL LAW — CHALLENGES — VANEUCE — EVIDENCE.—*United States v. Bowen*, Supreme Court of the District of Columbia. 4 Wash. L. R. 225. Opinion by OLIN, J. 1. At the trial of an indictment, twelve of the regular jurors were impaneled in another cause, and were out consulting upon their verdict. Defendant claimed the right, before the impaneling commenced, to have the whole array present and subject to his challenge. The court ruled against the point, and the jury was completed from the other jurors and talesmen, and the ruling of the court was sustained on appeal. 2. On an indictment for presenting a false claim against the United States, for back pay of a deceased soldier claimed by the defendant to be his brother, the allegation of the indictment was, that the brother was named "Major Dabney," and enlisted under the name of "George Bowen," whereas the proof was that defendant claimed to be the brother of George Bowen who served under the name of Major Dabney. It was held that the variance was immaterial, and the defendant properly convicted. 3. Previous good character is not sufficient to create such a doubt in the minds of the jury as would of itself justify an acquittal. 4. Declarations made to a witness by the father of an illegitimate son is not proof of pedigree.

MARRIED WOMAN—BUILDING ASSOCIATION.—*Wolbach v. Lehigh Building Association*, Supreme Court of Pennsylvania. 24 Pittsburgh L. J. 202. Opinion by STERRETT, J. 1. The act of 1848 does not expand the capacity of a married woman, so as to enable her to bind her separate estate to the performance of a contract as a member of a building association, under the act of 1859. 2. She is liable, however, for the amount actually received by her and applied to the improvement of her separate estate, with legal interest. 3. The act of 12th April, 1859, providing that the premium and fines accruing to a building association should not be deemed usurious, does not apply to a loan by such association to a married woman. 4. W. and wife gave a bond and mortgage to a building association, by which, in consideration of money loaned for the improvement of the wife's separate estate, they bound themselves to pay a larger sum, the wife assigning to the association as collateral security certain shares of their stock held

by her, and agreeing to pay the dues thereon, or in default thereof, certain fines to the association. On a *sci. fa.* upon the mortgage, *held*, (reversing the court below), that the wife was bound only to the extent of the actual money received by her, together with legal interest.

EFFECT OF STATUTE OF LIMITATIONS ON DEMAND-PAPER. *Palmer v. Palmer*, Supreme Court of Michigan. 4 Am. L. T. Rep. (N. S.) 366. Opinion by CAMPBELL, J.—Paper that is payable on demand is due at date. The collection of paper that is payable on demand, or at a fixed time, is barred by the statute of limitations, at the expiration of the statutory period from the date at which it became payable, whether demand has been made or not. The learned judge said:

"It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where from the form of the contract it is manifest that immediate payment was not expected. Thus in Norton v. Ellamy, 2 M. & W. 461, the note called for interest which indicated at least an expectation of some delay. In Howland v. Edmunds, 24 N. Y. 307, the premium capital notes of a mutual insurance company, payable 'in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require,' were held to stand on the same footing with ordinary demand-notes, so that the statute began to run from date. In Waters v. Thanet, 2 A & E. N. S. 757, a party had promised to pay the amount of certain dishonored bills 'whenever my circumstances may enable me to do so, and I may be called upon for that purpose.' This promise was made in 1833. An action was begun in 1838, less than six years after demand and within a year after plaintiff had learned of defendant's having become solvent through inheritances. It appeared, however, that he had actually become able to pay in 1825, and the court held the statute ran from such ability, without demand. A similar decision was made in Jones v. Eisler, 3 Kansas, 134, where the note was payable when the maker received a payment from government, or as soon as otherwise convenient. The statute was held to run after a reasonable time, which, there, was held on the facts to have been not later than sixty days. In Emery v. Day, 1 C., M. & R. 245, a contract was made for work payable out of a public fund to be provided, but it was held the statute began to run from the time the work was completed, although the fund was not raised until some time thereafter. * * * There are not more than half a dozen cases, if so many, in which this form of note has been passed upon directly. In Holmes v. Kerrison, 2 Taunt. 323, it was held that a note payable after sight was not barred until six years after it had been presented for payment. And in Thorpe v. Booth, Ryan & Moody, 388, upon the authority of that decision, a note dated March 12, 1813, payable twenty-four months after demand, and not demanded until June 28, 1823, was held not barred. In Holmes v. Kerrison, the case is put without further reasoning, upon the ground that no action could have been brought until after presentment, and Thorpe v. Booth contains no reasoning at all. While these decisions seem to have settled the practice in England, no subsequent case, so far as we have been informed, seems to have affirmed or vindicated them in any direct way, although they are probably adhered to. But so far as their principle is involved, it has been departed from to some extent, at least. In Webster v. Kirk, 9 L. & Eq. 408, it was held that a payee who had been sued by a subsequent holder of a dishonored bill, could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced. It was urged that the payee could not sue on a note which he did not hold, and that no action, therefore, accrued to him until he was damnified. But the court of queen's bench held, nevertheless, that the statute ran from the dishonor. This could only have been upon the ground that any of the parties might have taken up the paper and thus obtained a right of action. In Clayton v. Gosling 5. B. & C. 360, a note payable twelve months after notice had not been presented before the maker went into bankruptcy. The question came up whether it was provable under the commission as an existing debt due, and it was held provable. The court, however, placed the decision upon the ground that, inasmuch as the note contained the words 'for value received,' it was an admission of an existing debt, and might be regarded as security for it. This is a far-fetched reason, which shows how far it was deemed proper to go to prevent a failure of justice. In the United States there has been some incidental recognition of the doctrine of Holmes v. Kerrison. Thrall v. Mead, 40 Vermont, 540; Stanton v. Estate of Stanton, 37 Vermont, 411; and Wolfe v. Whiteman, 4 Harringt. 246, appear to adopt it. In New York there are *dicta* to the same effect in Wenman v. Mohawk Ins. Co. 13 Wend. 267; Bruce v. Tilson, 25 N. Y. 194; and Howland v. Edmunds before cited. No such point arose in any of these cases, and the actual decision in each of them is, in our opinion, difficult to harmonize with any such principle. In Morrison v. Mullin, 34 Penn. St. 12, it was held that, where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay. We can not but think this to be sound doctrine. Whatever may have been the ancient prejudice against statutes of limitation, they are now regarded as just and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor, by his own act and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But where no delay is contemplated, the rule is just and reasonable, and the presentment should be reasonably brought or the creditor should be subjected to the operation of the statute."

ABSTRACT OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

PRACTICE IN EQUITY—FORECLOSURE OF RAILWAY MORTGAGE—APPLICATION OF STOCKHOLDERS TO BE MADE PARTIES AND FOR LEAVE TO APPEAL, AFTER SALE.—*Ex parte Cutting et al.* Petition for mandamus. Opinion by the CHIEF JUSTICE. In a suit in equity to foreclose a railway mortgage, Akers, a stockholder, filed a cross-bill on behalf of himself and other stockholders. Subsequently these petitioners filed a petition asking to be joined with Akers as parties defendant. No action was ever had on this petition, and the petitioners were never recognized or acted as parties in the suit. Not long after the filing of this petition, Akers voluntarily dismissed his cross-bill. Afterwards a decree of foreclosure was entered,

a sale was made by a master, and was reported to the court, and a motion was made to confirm the same. On the day following this motion these petitioners, acting "not only for their own benefit, but for the benefit of all other holders or owners of the capital stock of said Pacific Railroad, who come in and contribute to the costs and expenses necessary for the prosecution of this suit," filed a motion and petition "for liberty to intervene to set aside the decree of June 6, 1876, and sale, and for liberty to demur, answer, plead, or appeal as advised," setting forth various frauds and other matters of defense to the foreclosure suit, and praying for appropriate relief. The court below refused liberty to intervene, and refused (Oct. 3) to grant an appeal from such order. The petitioners thereupon applied to the Supreme Court for a mandamus to compel the court below, or a judge thereof, to grant this motion. This relief was by the Supreme Court denied. In giving judgment, the CHIEF JUSTICE said: "We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus, in Myers v. Fenn, 5 Wall. 205, 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in Harrison v. Nixon, 9 Pet. 491, 'inquiries were made as to the respective claims' as asked for, and 'as to all parties who were claimants before the court by bill, petition, or otherwise, their complaint, petition and proceedings were dismissed.' So in Ogilvie v. Ins. Co., 2 Black, 540, petitions were filed by certain creditors praying to be made parties, and that a receiver might be appointed, which was done; and in Bronson v. R. R. Co., 2 Wall. 304, certain stockholders in a corporation were permitted to appear in a cause to which the corporation was a party, and present their several claims by answer in the name of the corporation; but this having been afterwards found to be irregular, the answers were considered 'rather by indulgence than a matter of strict right as the answer of the individual stockholders.' Upon the same principle it was held in R. R. Co. v. Bradley, 7 Wall. 577, that, where an appeal had been prayed for, and subsequently an appeal bond, approved by one of the judges, had been filed in the court, it would be inferred that an appeal had been allowed, although there was no express order to that effect in the record. From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted; and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. These petitioners seem to have been content to leave their interests in the hands of Akers, and when he went out they went with him." * * * Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree. No appeal lies from the order of October 3 refusing them leave to intervene and become parties; for that was only a motion in the cause, and not an independent suit in equity appealable here. Neither can these petitioners appeal as stockholders. Only parties, or those who represent them, can appeal. The stockholders do not represent the corporation, but for some purposes the corporation represents them. They are sometimes admitted as parties to a suit for the purpose of protecting their own interests in the corporation against unfounded and illegal claims against it, but this 'remedy is an extreme one, and should be admitted by the court with hesitation and caution.' Bronson v. R. R., 2 Wall. 302. It is always addressed to the sound judicial discretion of the court. That we can not control by mandamus. We need not consider what rights these petitioners would have if Akers had not withdrawn his intervention before the decree. After his withdrawal they had no representative stockholder party to the suit, and their position is the same as it would have been if no parties had ever intervened in their interest. The petition for mandamus is denied."

"FEDERAL QUESTION"—STATE TAXATION OF NATIONAL BANKS.—*Waite v. Dawley.* Error to Supreme Court of Vermont. Opinion by Mr. Justice MILLER (in full), as follows:

"This is a writ of error to the supreme court of the state of Vermont, and, as is frequent in writs to the state courts, it is objected that there is no jurisdiction. The plaintiff in error was cashier of a national bank in that state, and the judgment which this writ brings here for review was rendered against him for penalties imposed by a statute of that state, for his refusal to transmit to the clerk of the town of Brattleboro a true list of the shareholders of the bank who resided in that town, with the number of shares held and the amount paid on said shares. The record shows that 'the defendant's counsel claimed in defence that, as said bank was organized under the law of Congress referred to in plaintiff's declaration, the defendant as such cashier was amenable to no law but said law of Congress, and that the state legislature had not power to prescribe or define his duties as such cashier." That this proposition raises what is called a federal question within the meaning of the act of 1867, admits of no doubt. We are also of opinion that no judgment could have been rendered against defendant in the state courts without holding, and, in effect deciding, that this plea was bad; for if the state could not impose the duty of making such a list on the cashier by reason of the act of Congress, or the Constitution of the United States, then the defendant was guilty of no offence, and the judgment is for that reason erroneous. This plain proposition can not be evaded by an opinion delivered by the supreme court of that state. This court, therefore, has jurisdiction.

"And the single question raised by the record is, whether the statute of the state is void which requires 'the cashier of each national bank within the state, and the cashiers of all other banks, to transmit to the clerks of the several towns in the state in which any stock or shareholder of such banking association shall reside, a true list of the names of such stock or shareholders, with the number of shares standing against the name of such share or stockholder, on the books of such banking association, together with the amount of money actually paid in on such share on the first day of April.' The proposition on which this statute is asserted to be void is, that Congress has legislated upon the same subject, and that where there exists a concurrent right of legislation in the states and in Congress, and the latter has exercised its power, there remains in the state no authority to legislate on the same matter. It is not necessary to dispute that proposition, nor, when stated in this general language, can it be controverted. It is none the less true, however, that the line which divides what is occupied exclusively by any legislation of Congress from what is left open to the action of the states, is not always well defined, and is often distinguished by such nice shades of difference on each side as to require the closest scrutiny when the principle is invoked, as it is in this case. We have

more than once held in this court, that the national banks, organized under the acts of Congress, are subject to state legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation. This doctrine was clearly and distinctly announced in the case of The Bank v. The Commonwealth of Kentucky, 9 Wallace, 353, and that case has often been referred to since with approval in this court. The statute of Kentucky required 'the cashier of a bank, whose stock is taxed, to pay into the treasury the amount of the tax due. If not, he was to be liable for the same, with twenty per cent. upon the amount.' The stock thus to be taxed was, as in the present case, the stock of the shareholders, as authorized by the act of Congress, and that statute went a step further than to require a list of the names of these shareholders and the amount of their stock, and obliged the cashier to collect the tax out of the dividends and pay it over to the state. The precise point raised here was taken there and overruled by this court, namely, that the laws of the state could impose no such duty on the banks organized under the laws of the United States. The case is directly and conclusively in point. It seems to have been supposed that because Congress has required of each national bank that a list of its stockholders shall be kept posted up in some place in their business office, this covers the same ground as that covered by the Vermont statute. The act of Congress, however, was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank. It had no such purpose as the Vermont statute, and was wholly deficient in the information needed for the purposes of taxation by the state, as conceded to it by the act of Congress itself. Some legislation of Vermont was, therefore, necessary to the proper exercise of the rightful powers of the state, and, so far as it required this list, was not in conflict with any provision of the act of Congress.

"This leads to the second objection to the validity of the state statute, namely, that its purpose was to tax bank shares at other places than those where the bank was located. This case does not raise that question. 1. Because the bank whose cashier is the plaintiff in error was located in the town of Brattleboro, and the judgment against him is for refusing to deliver the list of shareholders to the clerk of that town, and not for his refusal to deliver such a list to any other town than the one where it was located. The delivery of a list to this clerk of the shareholders in that town would have been in aid of the taxation of the shares at the place where the bank was organized and did business, and such taxation is legal within the narrowest definition of the act of Congress. 2. But if it be true that so much of this statute as is supposed to authorize other towns, in which shareholders reside, to tax such shares, is unconstitutional, that does not invalidate the part of it we have been considering. It will be time enough to decide the provision of the state law authorizing such taxation unconstitutional when an attempt is made to collect such a tax, and the party resisting it shall bring the case here. The cashier has no right to make a case for him in advance. His rights are not affected by the acts here demanded of the cashier. This court does not sit here to try moot cases to solve a question which may never be raised by any party entitled to raise it.

"The judgment of the Supreme Court of Vermont is affirmed."

SELECTIONS.

LITERARY PIRACY IN AMERICA.

From the (London) *Law Times*.

My attention has just been called to a statement in your issue of the 14th of the last month, regarding a pretty free use made by Wharton, in his work on Agency, of material drawn without acknowledgment from your columns. I am sorry to say that what you have thus presented to your readers is but a drop from an ocean of fact, of which many Americans are ignorant, and of which, unhappily, others are not ashamed. Among the early incidents in my life of authorship is the following: I was applied to by a very eminent publishing house to produce a legal work on a subject named, the copyright to go to the house for a round sum. I declined for several reasons, among which I said that I could not afford it. "We do not ask," replied the representative of the house, "that you should produce for us a first-class work. There are two English books on that subject; you can cut them up, introduce a little American matter, and we shall be satisfied. Other authors do so, and there is no reason why you should not." I mentioned the incident to an eminent legal person of my acquaintance, and asked him for his views. "By all means, do it." Being surprised, I stated some objections, and intimated that a man, if disposed, could hardly make it profitable to sell himself and destroy his reputation for the price. "Not at all," he replied; "you would, of course, manage the enterprise cautiously. You would have a contract in writing with the publishers, containing the stipulation that on the title-page should be printed, in bold type, the words: 'This book is made from stealings, by the job, to sell.' Put that on, and you will be safe." Perhaps this incident, which occurred nearly twenty-five years ago, may have sharpened my observations and given intensity to my thoughts upon an evil against which no one man in this country has any power to contend. In the absence of any international copyright, it is deemed just with us to reprint English books *ad libitum*. So much, right or wrong, is established. But ever since I have known anything of law books, we have had authors and publishers who go further, namely, that it is no reprehensible piracy for an American author to appropriate whatever he may find in an English book as his own. It is done in different ways. Sometimes the author makes a series of rather indefinite acknowledgments in his notes, carefully excluding from his text marks of quotation or other intimation that the matter is not original. Sometimes he covers the thing by an indistinct expression of thankfulness, in his preface; sometimes the coveted morsel is simply taken and swallowed, and nothing is said; at other times one can discover elaborate efforts at concealment, as if from consciousness of theft. The men who do these things are not wicked; on the contrary, they are among our best men. Wharton, for example, is an excellent gentleman, a clergyman, a doctor of divinity, a teacher of theology to young candidates for the holy ministry, and a Christian. Thus, all this sort of thing is, by a part of us,—and perhaps the better part,—regarded as right and proper. Others of us are of a contrary opinion; and, if the voice of American lawyers could be taken, doubtless an overwhelming majority would be found against it. But the voice can not be taken. Those who approve of this sort of thing, and especially those who, or whose friends, profit by it, will, of course, be silent, and, as far as in their power, enforce silence in others. And the time, the occasion, and person to speak, among those who do not approve, can never come, unless forced upon us by something from abroad. Long as the world has stood, and many able, excellent and ad-

venturous men as it has contained, and great as have been the discoveries in nearly every species of knowledge, no one ever discovered how to find the proper time, occasion or person to disclose an unwelcome truth. We have legal periodicals, as you have; but, though my attention has been directed to this subject many years, I never heard that one of them committed the indiscretion of uttering a word against this practice. How could they? Large amounts of money, to say nothing of reputations, are involved in this. A crusade against a great interest would, in some of them, end in their own death. Why should one commit suicide, unless some pillar of a heathen temple is to be overturned at the same time? I once wrote a book, now temporarily out of print, wherein it lay in my path to explore this whole thing. I made a few hints, all I dared to, and too many for the good of the book, but proceeded no further, because I knew that if I did I should be resisted by powers I was not in a situation to grapple with and overcome. It lay in my path, and it was my plain duty, in the last edition of my work on the "Criminal Law," to state what had been done by previous authors on the subject, and what were the nature and qualities of their labors. But to do so required a partial unfolding—not much, but a little—of the topic of this letter. I could proceed easily enough in this duty until the chapter was written, and put in type by the printer; but the further step to the publication I could find no way to make practicable. What I was doing was evidently indiscreet; the time, the occasion, and the person had not met. Of course, there was no way but to retrace a wrong step. I send you the chapter and the work, that you may see where the chapter belongs.

Now, my objections to American authors making books by appropriating the labors of English writers as their own, are twofold. In the first place, it is an egregious wrong to the English author. It is hard enough to have his book reprinted abroad, without compensation. But if it is accurately and openly done, he has the pleasure of seeing his views appreciated, his name made known, and his fame enhanced. This is not bread and butter, still, it is what some men like even better. But when a foreigner publishes his views, and, perhaps, his words, as original, in a foreign country, with no credit, or an indistinct one, amounting to nothing, and then they come back, and the foreign book is praised for them, and he is ignored, and by and by dates are forgotten, and he is suspected of pirating the foreign book, a rebellion against the ways of man, if not of God, arises in his breast. No talk about the lack of an international copyright appeases him. He knows that he is wronged. And no man is justified in inflicting this wrong on another, though separated from him by an ocean, and ruled by a different sovereign. In the next place, good text books are essential to the true culture of the law in any country. With us there are competent men who will not publish as their own what is not such in fact. And it is believed that there are of these many who would advance the law by their writings did they not shrink from competition with gentlemen who publish the productions of English minds as original. No man who does not examine the sources of the law for himself can make a good text-book, whatever he may pretend, or his friends may pretend for him. Thus, we are often prevented from having, upon a subject, the sort of text-book which the exigency demands. I do not speak of the effect on the mind of the author himself, because I do not deem it of consequence what effect is produced on the mind of one who can publish another's production as his own.

The foregoing is merely introductory to the real point of my letter, which is, that if you in England would protect your own authors, you must begin the work yourselves. Those who would gladly do it here are powerless. But if you will once begin the work, and do it resolutely, by exposing every American piracy of the sort I have described, you will soon have plenty of help on this side of the Atlantic.

JOEL P. BISHOP.

Cambridge, Mass., U. S. A.

[The above letter may be thought by some a little strong; but it simply contains the bold and frank expressions of a man who never consciously told a lie, and who never knowingly shrank from telling the truth, when the truth was needed. With regard to his allusions to Dr. Wharton, we do not believe that that gentleman ever consciously appropriated the ideas of another writer, without giving the proper credit. We must also, so far as *we* are concerned, deny Mr. Bishop's impeachment of American legal periodicals. In the second volume of this journal (pp. 305, 421) we denounced unsparingly a practice precisely similar to the one against which Mr. Bishop inveighs, and for our frankness in this matter a libel suit against the former publishers of this journal is still pending.—ED. C. L. J.]

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

(Filed June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

RECORD OF JUDGMENT ON INSTRUMENT OF WRITING.—A transcript of a judgment is an instrument of writing within the meaning of the practice act; and when suit is brought on a judgment a transcript of it must be filed with the declaration; and upon a failure to do so, defendant, on demanding it, is entitled to a continuance. Opinion *per curiam*, reversing.—*Jefferson v. Alexander.*

CHATTEL-MORTGAGE — CERTIFICATE OF OFFICER.—Where the certificate of a justice of the peace, taking an acknowledgment of a chattel-mortgage, failed to state, after the statement that it was "acknowledged before me by," etc., that it "was entered by me," as required by the statute, but the acknowledgment was good in every other respect, *held*, that the mortgage was acknowledged *substantially* in the mode required by the statute. Opinion by CRAIG, J.—*Schroeder v. Keller.*

MALICIOUS PROSECUTION — SPECIAL DAMAGES.—In an action for malicious prosecution the plaintiff must, in his declaration, allege special damages, in order to be entitled to prove and obtain them. One who is licensed by the supreme court of this state to practice law, is presumed to be competent to give legal counsel; and an instruction which makes it necessary to prove that an attorney, to whom defendant resorted for advice, is "learned in the law," is erroneous. Opinion by SHELDON, C. J., reversing. *Horne v. Sullivan.*

PUBLIC OFFICERS—HOW AFFECTED BY FAILURE TO PRESENT A CLAIM AGAINST ESTATE.—Under the provisions of the Statute of March 4, 1869, making it the duty of the payee or assignee of a note, in case of the death of the principal, to present the same for payment against the estate of the principal within two years after the granting of letters testamentary, and on failure so to do, releasing the sureties from payment thereof, *held*, that the statute is applicable to payees of notes who are *public officers*, viz: trustees of schools, by whom school money was lent to the principal, who gave his note indorsed by sureties, to the trustees, who failed to present the same for payment within two years. Opinion by DICKEY, J.—*House v. Board of Trustees, etc.*

ASSIGNEE OF CERTIFICATE OF PURCHASE AT A JUDICIAL SALE.—Although a purchaser of lands at a judicial sale should have notice of any motion to set aside such sale on account of any irregularity, that principle can not be extended so as to include an assignee of the certificate, he not being regarded as an innocent purchaser and entitled to protection as such, until he is clothed with the legal title by a sheriff's deed. The better practice would be to permit the assignee, when notice comes to him from the assignor, or from any other source, to come in by petition within any reasonable time and obtain leave to contest the motion to set aside the sale. Opinion by SCOTT, J. —*Roberts v. Cleland.*

CORPORATION—SUBSCRIPTION TO STOCK—STOCK NOTE. —A subscription to the stock of a corporation creates a liability on the part of the subscriber to pay to the company the amount of his subscription. But where a note is given by a subscriber for stock to be paid up "on the call of the directors, as they might be instructed by the majority of the stockholders represented at any regular meeting," the company being insolvent and in the hands of a receiver, in a suit brought on a note by the receiver, *held*, that a recovery can be had only on the terms of the subscription, and that, by the insolvency of the company and the transfer of its assets to a receiver, a stock note such as this can be enforced only to the extent of the deficit or debts of the company, and the declaration should show them. Opinion by BREESE, J.—*The Lamar Ins. Co. to use, etc., v. Moore.*

MORTGAGE — FORECLOSURE — DESTRUCTION OF RECORDS.—Where A. and B., owning real estate, mortgaged it to C., who assigns it to D. and E., and the mortgage is foreclosed in a regular manner, and a decree entered and sale of the premises ordered, under which sale D. and E. buy in the property, but fail to get a deed for the same, and where the court-house containing the record of the foreclosure is subsequently burned down, the records being destroyed, *held*, on a bill filed by F., who purchased of D. and E., asking for relief, that it is error to dismiss the bill, and that the lower court should decree that the court records of this property should be restored, and a deed should be made to the assignee of the purchasers of the premises, and that he be put into possession. Opinion by BREESE, J., reversing.—*Curyea v. Berry et al.*

JURORS—DISQUALIFICATION.—Where, in a suit by a married woman, for the sale of intoxicating liquors to her husband, an hibitual drunkard, a juror, being examined on the *voir dire*, said, "he had a prejudice against men engaged in the sale of intoxicating liquors"; *held*, (1) not good ground for challenge for cause. The sale of intoxicating liquors under our law is a crime. The mere fact that a man may have a prejudice against crime does not disqualify him as a juror. (2) Where a juror is challenged for cause, his challenge being improperly overruled, but the juror is then challenged peremptorily, and it turns out afterwards that the party making such challenge does not, in selecting the other jurors, exhaust *all* his peremptory challenges, *held*, that although there was error in disallowing the challenge for cause, still no injury was done, and hence no ground for reversal. Opinion by CRAIG, J.; DICKEY, J., dissenting.—*Robinson v. Randall.*

GUARDIAN AND WARD.—While the relation actually subsists, no contract can be made between guardian and ward; but if a conveyance is made to the guardian by the ward just after attaining his majority, courts will examine the transaction in all its aspects; hence, where it was shown that property was conveyed by the ward to the guardian nine months after arriving at age, that the guardian never made to the county court any report of his guardianship, that the consideration named in the deed was $1,300, but that the ward was only paid $600, being told by the guardian that an indebtedness of $700 existed against the land, when in fact a debt of $40 was all that was held against it, and that under these representations she conveyed the land, a court of equity will set aside the sale and order the money paid, by the guardian to the ward, to be paid back. Opinion by CRAIG, J., reversing.—*Wickhiser v. Cook.*

REPLEVIN — LEVY OF EXECUTION BY SHERIFF AND CONSTABLE ON SAME GOODS. — Where a constable, in conformity to an execution issued out of a justice's court, levies on goods, takes them away and locks them up, and a sheriff, who having had, a month previous, an execution put into his hands against the same party, issued out of the circuit court, and who, being about to levy on the same goods upon which the constable subsequently levies, is told by the attorney for the plaintiff to make no levy but to hold the execution for a little while, and then on the same day when the constable levies, and shortly after it, is ordered to make his levy, upon which he takes away the goods which the constable has locked up, and pretends to make a levy thereupon; *held*, that replevin on the part of the constable will lie, on the ground that a party having an execution, which is a lien on the property, has no legal right to extend the time of its collection, and if he does so, he looses his priority. Opinion by BREESE, J., reversing.—*Gilman v. Davis.*

RAILWAY—NEGLIGENCE—RECEIVER—BROKEN WHEEL. —1. Where a defendant has pleaded to the original declaration, he can not plead, to the jurisdiction of the court, to an amended declaration not setting out a new and different cause of action. 2. A suggestion and affidavit that the railroad company defendant had been placed under the control of a receiver, is not good gound for a continuance. 3. Evidence as to the speed of a train causing the injury is not admissible where the declaration fails to allege that the injury was caused by a high rate of speed. 4. That where a car wheel breaks when in operation raises the presumption of negligence in the company, but that presumption is overcome by showing that the wheel was the work of one of the most skillful manufacturers in the United States, that it was of the kind usually employed in the service, and had been subject to and withstood the usual tests. 5. A railroad company is liable only for *gross negligence* amounting to willful injury to a person injured while on the road, not paying his fare, and traveling on a free pass issued in the name of another party, and not transferable. Opinion by BREESE, J.; SCOTT, J., dissenting.—*T. W. & W. R. R. Co. v. Beggs.*

POLICY OF INSURANCE — GUARANTY. — Where the Stock and Mutual Ins. Co. consolidated with the National Ins. Co., the latter, in consideration of the assets of the former, assuming all its "policy risks," and at the time there were claims and judgments against both companies, and it was agreed that three stockholders of each company should give their individual written guaranty to the other company, which was signed by the three stockholders, who thereby "agreed to and do hereby gaurantee and assume to pay, and will pay all the debts, etc., now outstanding," etc.; and where the National Ins. Co., sometime after, reinsured all of its risks in the State Ins. Co., which shortly after became insolvent; *held*, in a suit against the stockholders who guaranteed the debts of the Stock and Mutual Ins. Co., on the part of one who had a policy in that company, the insured property being destroyed by fire, that the guarantee was merely an indemnity to the National Ins. Co. against loss from the liabilities of the Stock and Mutual Ins. Co., and not a guarantee to the holders of such claims, the policy-holders not being intended as parties to the agreement. Opinion by WALKER, J.—*Hedges, for use, etc., v. Bowen et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

PRACTICE IN CASE THE ALLEGED ERROR IS AGAINST THE VERDICT.—Where the ground of error is that the verdict is against the evidence, the record must disclose not only what the evidence is, but also what the issues are, for no evidence is material which does not bear upon the issues, and none is to be regarded which contradicts the admitted facts. Opinion by BREWER, J. All the justices concurring. Affirmed.—*Ort v. Patrick.*

INSURANCE CORPORATIONS — CAPITAL STOCK — CONSTRUCTION OF LOCAL STATUTE.—A statute prohibiting insurance corporations from "taking risks" or transacting any "business of insurance," except upon certain conditions, does not, even when such conditions are not complied with, invalidate subscriptions made to the capital stock of such corporations, or notes given in payment thereof. Opinion by BREWER, J.; all the justices concurring. Affirmed.—*Bartlett v. Chouteau Ins. Co.*

EXEMPTION OF HOUSEHOLD GOODS.—Where the household goods of a debtor, who is the head of a family, do not

exceed in value $500, they are all exempt under the exemption laws from attachment, and it will make no difference that some of them may not be necessary for the personal use of the debtor or his family, or that they be kept merely for the use of paying guests or boarders. Opinion by VALENTINE, J.; HORTON, C. J., concurring. Reversed.—*Rasur v. Hart.*

OVERFLOW OF LAND—DAMAGES.—F. builds a dam and mill on his own land; the dam raising the water in the stream, caused it to overflow the land of M., an upper riparian owner. The mill was of no special benefit to M. or to his lands, and the only benefit that M. received therefrom was that general benefit which accrued to all in the vicinity from the building a mill in their midst. *Held*, in an action by M. to recover damages for the overflow of his land, that F. could not offset or reduce those damages by the general benefits resulting to M. from the building and proximity of the mill. Opinion by BREWER, J.; all the justices concurring. Reversed.—*Marcey v. Fries.*

CONDEMNATION OF LAND FOR PUBLIC PURPOSES—APPEAL VACATES AWARD—INJUNCTION.—Where the official authorities of a city of the third class attempt to take private property for public use, and the compensation therefor has been determined by the assessment of five disinterested householders of the city, and the land-owner has availed himself of an appeal from the decision of such householders to the district court, he is entitled, in the absence of provisions of law to the contrary, to the possession of his land during the pendency of the appeal, and to an injunction, if necessary, to protect such possession. Opinion by HORTON, C. J.; all the justices concurring. Affirmed—*The City of Kansas v. The Kans. Pacific R'y Co.*

TITLE-BOND—PETITION.—1. Where a bond, which requires the obligor to convey to the obligee certain real estate, does not show upon its face that it was executed with or without any sufficient consideration, or what the consideration was, such bond nevertheless imports in law a sufficient consideration. 2. Where an action is commenced upon such a bond, it is not necessary for the plaintiff to allege in his petition that the execution of such bond was founded upon a sufficient consideration, or to state what the consideration was. Presumptions of law are never required to be set forth in the pleadings. Opinion by VALENTINE, J.; all the justices concurring. Reversed.—*The Northern Kansas Loan and Town Co. v. Oswalt et al.*

TRIAL IN A LAW OFFICE.—Where a district judge, while holding a regular session of court, designates a law office in the neighborhood of the court house for the trial of a civil action, and thereupon leaves the regular court room and proceeds to such law office, accompanied by the under sheriff and the jurors, and there tries such cause, and all the parties thereto are present and participate in all the proceedings, and no exceptions are taken or objections made other than the defendant protests against leaving the court room, and against having the trial in said law office; *held*, that the proceedings had at the place thus designated are not void, and that no substantial error is thereby committed affecting materially the rights of such defendant. Opinion by HORTON, C. J.; all the justices concurring. Affirmed.—*Mohon v. Harkreader.*

ATTACHMENT LIEN NOT A SUFFICIENT CLAIM TO ATTACK AN ALLEGED VOID ASSIGNMENT.—L. made a general assignment for the benefit of his creditors. T. commenced an action against L., and caused an attachment to be issued and levied upon the property of L. covered by the assignment. Immediately thereafter, and before judgment in the attachment suit, he commenced an action against L. and his assignee to have the assignment declared void. *Held*, that such action could not be maintained; that an attaching creditor had not before judgment in the attachment suit such a *certain* claim upon the property of the defendant as would entitle him to maintain an action to set aside an alleged fraudulent conveyance of the defendant. Opinion by BREWER, J. VALENTINE, J., concurring. Affirmed.—*Tennent v. Lucas et al.*

PARTIES—TRANSFER OF NOTE AND MORTGAGE—WAIVER OF APPRAISEMENT—STAY OF EXECUTION.—1. Where the plaintiff, in an action on a note and mortgage, assigns the note to a third person and afterwards dies, *held*, that it is error to allow such action to be prosecuted to final judgment in the name of the administrator of said plaintiff. 2. And in such a case, where said assignee is not a party to the action, *held*, that it is error to render judgment in favor of the administrator even, to the use of said assignee. 3. And further *held*, that said action should have been revived and prosecuted in the name of said assignee. 4. Where appraisement is waived, the defendant is entitled to a stay of execution for six months. Laws of 1872, p. 105. Therefore, *held*, that a judgment which authorizes a sale of real estate without appraisement, and gives a stay of execution for only twenty days, is erroneous. Opinion by VALENTINE, J.; all the justices concurring. Reversed.—*Reynolds et al. Quaely et al.*

MECHANIC'S LIEN—WEIGHT OF EVIDENCE—APPLICATION OF PAYMENTS.—1. Where the principal question in a case is whether the plaintiff has a mechanic's lien on a certain building, and all the evidence in the case, and sufficient evidence, tends to show that the plaintiff had such mechanic's lien; and the jury on said question finds against said plaintiff, and the court, on a proper motion to set aside the verdict and to grant a new trial, overrules the motion, *held*, that the court committed material error. 2. Where a debtor, who owes to his creditor several distinct debts, makes a payment to his creditor, the debtor may apply such payment to any one of such debts which he chooses; and if he does not make the application, then the creditor may do so; but if neither makes any such application, then the law will make the application in the manner which is most equitable, and, in doing so, the law will generally apply the payment to the oldest debt, or to the earliest item of the same debt, or to a debt that is due in preference to one that is not due; and generally, where one debt is secured and the other is not, the law will apply the payment to the debt which is not secured. Opinion by VALENTINE, J.; all the justices concurring. Reversed.—*Shellaberger & Leidigh v. Binns.*

DIVORCE—INSANITY NO CAUSE—VOID MARRIAGE—CONSTRUCTION OF STATUTE RELATING TO IMPOTENCY.—1. Insanity, occurring after marriage, is not cause for divorce, and nothing which is a consequence of it can be, and, *held*, that neither is impotency caused by such insanity, nor extreme cruelty, while so insane, ground for divorce. 2. The provision of the statute that the district court may grant a divorce for impotency, is to be construed that the impotence must have existed at the time of the marriage. 3. A marriage with an insane person is absolutely void, for want of sufficient mental capacity on the part of such insane person to consent to the marriage. 4. If a marriage is void by reason of the insanity of either of the contracting parties, while no judgment annulling such marriage as void *ab initio* is necessary to restore the parties to their original rights, yet a sentence of nullity in such case is conducive to good order and decorum, and to the peace and conscience of the party seeking it. 5. Section 648 of the civil code, Gen. Stat. p. 759, makes provision only for incapables to bring actions to have a marriage to which such person is a party declared void; but independent of this statute and the sections of the law relating to divorce, the district court, on the application of either party to such a marriage, has jurisdiction to hear the cause, investigate the charge, and to afford the requisite relief. Opinion by HORTON, C. J.; all the justices concurring. Affirmed.—*Powell v. Powell.*

OFFICIAL BONDS—WHEN DEMAND NOT NECESSARY ON TREASURER OF SCHOOL DISTRICT—PRACTICE.—1. All official bonds are joint and several, and a suit may be maintained on the bond of a treasurer of a school district against one or all of the obligors. 2. Where a suit is brought against joint and several obligors, in which process is not served on all the defendants, judgment may be taken against those served, and the judgment is no bar to subsequent proceedings against one not served at the rendition of the judgment. 3. Where the treasurer of a school district resigns his office, removes from the district and county in which he had lived, conceals his place of abode and neglects to pay over to his successor in office the money in his hands as such treasurer, belonging to the district, no demand therefor is necessary to maintain a suit on the official bond of such treasurer for the recovery of the money so wrongfully retained. 4. Affidavits on a motion in the court below, to become a part of the record so as to be reviewable by the supreme court, must be included in the bill of exceptions or the case made. Backus v. Clarke, 1 Kans. 303; Altschiel v. Smith, 9 Kans. 90. Opinion by HORTON, C. J.; all the justices concurring. Affirmed.—*Jenks v. School District 38 of Coffey County.*

EXECUTION OF A NOTE BY AGENTS—IRREGULAR JUDGMENT.—1. Where the plaintiff alleges in his petition,

among other things, that, "On the 26th day of May, A. D. 1873, the defendant, Charles A. Phillip and John T. Abeel, her attorneys in fact, made and delivered to one L. M. Taylor, her promissory note of that date, and thereby promised to pay to said L. M. Taylor or order, four months after date thereof, the sum of two hundred and eighty dollars," etc., and gives with his petition and as part thereof a copy of the note, which is signed as follows: "Eliza C. Abeel, by Charles A. Phillip and John T. Abeel" —Eliza C. Abeel being the defendant, and the sufficiency of the allegations of the petition are not in any manner attacked until after judgment; *held*, that the allegations of the petition, with regard to the execution of the note, are sufficient to charge the defendant. 2. Where the court, in rendering judgment on a promissory note, includes, in such judgment, an attorney fee of fifty dollars, and afterwards, on a motion being made by the defendant to vacate the entire judgment, overrules said motion, but at the same time so modifies the judgment as to make it a judgment only for the amount of the interest and cost,—not including the costs of said motion; *held*, that the judgment as thus modified is not erroneous, to the extent of said attorney's fee, as the judgment was originally rendered. Judgment affirmed. Opinion by VALENTINE, J.; all the justices concurring.—*Abel v. Harrington.*

EQUITIES BETWEEN JOINT MAKERS OF A NOTE.—On August 31st, 1872, F. and H. executed a joint note to G., payable in one year. On the face of the note each appeared as principal. In fact the note was given for borrowed money, and the money was borrowed for F., and received and used by him. To secure this note H. gave a mortgage on certain real estate which mortgage was duly recorded. In September, 1873, F. handed to H. the amount of the loan and took from him a receipt therefor in which the latter promised to pay the note. Instead, however, of then paying it, he obtained an extension of a year by the payment of advance interest and a bonus. On January 9th, 1874, H. borrowed money of S. and gave a note secured by a mortgage on the same and other property. On September 3d, 1874, F. paid to G. the amount then due on the note and took an assignment without recourse. *Held*, that at first F. was to be regarded as the principal debtor, and that a payment by him to the payee of the note prior to September, 1873, would have discharged both notes and mortgage absolutely; and *held* further, that by the payment in September, 1873, from F. to H., the promise of the latter to pay the note, and the obtaining of a year's extension of the time of payment, H. became in equity the principal debtor, and that as all this took place before the note and mortgage to S., the latter's rights were in no way prejudiced, and that F., by his subsequent payment to G., and the assignment of the note, was entitled to hold that note and mortgage as a valid and prior lien upon the mortgaged premises. Opinion by BREWER, J.; all the justices concurring. Reversed. *Fields v. Sherrill et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, }
" WARWICK HOUGH, } Associate Justices.
" E. H. NORTON, }
" JOHN W. HENRY, }

COVENANT OF SEIZIN—DAMAGES FOR BREACH.—The existence of a title paramount, whether asserted or not, is a breach of the covenant of seizin. Where the grantee takes possession, he can only recover nominal damages until evicted by title paramount. 11 Mo. 467; 13 Mo. 521; 23 Mo. 151; 48 Mo. 247. Opinion by HENRY, J.—*Cockrell v. Proctor.*

INDICTMENT INSTRUCTIONS.—It is error, for which a judgment of conviction will be reversed, to instruct a jury in a trial for murder, that if defendant "was present, aiding abetting, counseling, advising, inciting, encouraging *or approving*," etc., he is guilty. "Approving" might be a mere mental assent to the fact of killing, without any external manifestation that could make it *aid* or *abet*, etc., the slayer. Opinion by NAPTON, J.—*State v. Cox.*

INDICTMENT—CERTAINTY.—An indictment for murder, which charges that defendant gave deceased a mortal wound, etc., "of which mortal wound James Abner *did instantly die*," is not sufficient. The indictment must charge the day on which deceased died. If it had charged "did *then* instantly die," it would have been sufficient. State v. Lester, 9 Mo. 658 State v. Sides, decided at the last term. Opinion by HENRY, J.—*State v. Lukey.*

DESTRUCTION OF GAMBLING DEVICES—ORDER OF THE JUDGE.—Under sections 24, 25, 26, 27 and 21 of article 8 of the statute concerning crimes and punishments (1 Wag. Stats. 503), the law does not authorize a judge or justice to order the destruction of the various gambling devices therein mentioned, unless the same are "kept or used for gaming purposes," and the order of a judge which fails to show that it applies to gambling devices "kept or used for those purposes," is *void on its face*, and gives no protection to the officer who executes the order. Opinion by NAPTON, J.—*McCoy v. Zane.*

QUO WARRANTO—JURISDICTION IN COURTS OF LIMITED JURISDICTION MUST APPEAR ON THE FACE OF THE RECORD.—In proceedings upon information in the nature of *quo warranto*, neither party is entitled to demand a *trial by jury*. Even questions of fact may be tried by the court, and the granting of a jury to try issues of fact is *ex gratia*, and not a matter of right. State v. Allen, 5 Kan. 213; State v. Johnson, 26 Ark. 281; State v. Vail, 53 Mo. 97. Where proceedings are instituted before a mayor and city council for the removal of a municipal officer, a general charge of "misconduct in office and neglect of duty" is not sufficient. The *facts* must be stated so that jurisdiction of the offense may appear. Opinion by HOUGH, J.—*State ex rel. Norton v. Lupton.*

COMMON CARRIER—SPECIAL CONTRACT—COMMON-LAW LIABILITY.—Where a common carrier receives freight to be shipped under a special contract, and there is loss or injury to such freight, the shipper is not restricted to an action upon the contract, but may sue upon the common-law liability of the carrier, without noticing the contract. But where the defendant, on the trial of such a case, pleads the special contract, or introduces it in evidence in a justice's court, it is the duty of the trial court to instruct the jury properly with reference to the provisions of the contract by which the carrier's common-law liability is limited, or by which duties are assumed by the shipper. 2 Blackstone's Rep. 1, 111; Burnett v. Lynch, 5 B. & C. 587; Partington v. R. R. Co., 1 H. & W. (Exch.) 392; Mich S. &. M. I. R. R. v. Henton, 37 Ind. 448; S. B. Van Wall v. King, 16 How. U. S. R. 469; Welch v. P. F. W. R. R., 10 Ohio, 65; Davidson v. Graham *et al.*, 2 Ohio St. R. 131; Camp v. H. & N. Y. S. B. Co., 3 L. & E. Reporter, No. 17. Opinion by NAPTON, J.—*Clark v. St. L., K. C. & N. R.*

DAMAGES—EFFECT OF THE THIRD SECTION OF THE DAMAGE ACT.—Where the person injured had a right of action for the injury at common law, the third section, in case of the death of the injured person, creates a survivorship of the right of action to the legal representatives of the deceased mentioned in the act. And in such a case it is not necessary to refer to the act in the petition, if the facts alleged make out a case under the statute. The cases of Hewett v. Harvey, 46 Mo. 363; Lowe v. Harriman, 8 Mo. 352, and Waltham v. Warner, 26 Mo. 141, are not considered irreconcilable with the decision in Rennayde v. Pac. R. R., because those cases were actions for penalties claimed under special statutory provisions, and in such cases a reference to the statute is necessary. Where the wife sues for damages caused by the killing of her husband, and the defendant defends on the ground that the killing "was in self-defense," the law upon the plea of self-defense in such cases is the same as if the defendant was on trial upon indictment for the killing. Opinion by NAPTON, J.—*White v. Maxey.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF COLORADO.

April Term, 1877.

HON. HENRY C. THATCHER, Chief Justice.
" EBENEZER T. WELLS, } Associate Justices.
" SAMUEL H. ELBERT, }

WANT OF JURISDICTION—COSTS.—1. When the supreme court has no jurisdiction of a case, and this is apparent on the face of the record, it will not dismiss such case for want of prosecution. A dismissal for want of prosecution

in such case would be inapt, as such an order implies that prosecution of the suit by the appellant is legally possible. The suit must be dismissed for want of jurisdiction. 2. In dismissing the case for want of jurisdiction, this court has not power to award costs to the defendant. The court, being without jurisdiction, has no possession of the case, and can render no judgment except to dismiss the suit. Where there is no jurisdiction, there can be no judgment. Even the general powers of a court of equity, in equity causes, do not cover the case. This rule certainly works a hardship, but it is one which can be removed only by legislation. Opinion by ELBERT, J.—*Bartels v. Hoey.*

CHATTEL MORTGAGES—DOMICILE OF CORPORATIONS.—1. The statute requires that a chattel mortgage shall be acknowledged before a notary public in the precinct where the mortgagor resides, and be recorded in that county, in order to make it valid as against third persons. Under such a statute, a valid chattel mortgage can not be made by a non-resident of this state, whether the mortgagor be a natural person or a corporation. 2. A corporation is a resident of the state under whose laws it is chartered. It can not migrate or acquire a residence in another state. It may be permitted to do business in another state by the courtesy of the latter state, but it does not thereby become a resident of the latter. Its residence, so far as residence may be predicated of a corporation, still remains within the territorial jurisdiction of the law-making power to which it owes its existence. 3. The statute authorizing chattel mortgages is in derogation of the common law, and must be strictly pursued. Opinion by THATCHER, C. J.—*Cook v. Hagar.*

PENAL STATUTES — REMEDIES UNDER THEM — THEIR REPEAL.—Where a statute requires the trustees of a corporation to file for record, at a given time, annually, a report of its condition, assets and liabilities, and, in case of their failure to do so, makes each of them liable for the debts contracted by such corporation, such a statute is in its nature a penal statute; and when such a statute is repealed, before a creditor of a corporation enforces the liability of a delinquent trustee, by obtaining a judgment against him, the repeal, without the saving clause in the repealing statute, takes away the remedy of the creditor and the liability of the trustee. The right of the creditor to pursue the trustee depends exclusively upon the statute, and all judicial proceedings after the repeal are without authority of law. There is no such thing as a vested interest in an unenforced penalty. Opinion by THATCHER, C. J.—*Gregory v. The German Bank of Denver.*

ATTORNEYS AT LAW—THEIR REMEDIES FOR FEES—THE LEGAL FRANCHISE.—The right to practice law is a personal franchise, and belongs exclusively to those who are specially authorized and licensed under the laws of the state to practice law in its courts. No person but a licensed attorney, under the laws of the state, can recover in a suit brought for professional services. A person not licensed as an attorney can not evade the statute and the public policy in regard to attorneys, by forming a partnership with a licensed attorney, and rendering with him joint professional services as attorneys. Where two persons sue jointly as attorneys for professional services rendered by them jointly, and one of them was not a licensed attorney when said services were rendered, they can not recover; the licensed attorney must sue alone for his fees. Opinion by THATCHER, C. J.—*Hittson v. Brown & Putnam.*

PLEADING—SET-OFF—STATUTE OF FRAUDS.—1. A declaration upon a promise, which is good at common law as a parol promise, need not show a compliance with the statute of frauds. The statute of frauds prescribes a rule of evidence, and not a rule of pleading. 2. A plea of set-off is in the nature of a declaration, and, in respect to the degree of certainty required, is governed by the same rule. 3. While there is great and irreconcilable conflict in the authorities upon the question whether, in contracts made between two parties, a stranger to the consideration can enforce the contract by an action thereon in his own name, even though he be avowedly the party intended to be benefited by the contract, yet, as regards simple contracts, the decided preponderance of American authority sustains the action of the beneficiary in his own name. This rule seems most reasonable and convenient, since it gives the remedy to the party who, in most instances, is chiefly interested in enforcing the promise, and it avoids multiplicity of actions, and it seems impossible that this rule can work injustice to either party. Opinion by WELLS, J.—*Schone v. Simonton.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

SETTING ASIDE JUDGMENT — SETTING ASIDE SALE ON EXECUTION.—1. After the lapse of four and a half years from the entry of judgment, the court has no power to set it aside for a mere irregularity,—as for a want of notice of the taxation of costs,—even where the judgment defendant had no knowledge or notice of its entry until about the time of his application to vacate; but it may set aside a sale upon execution under such judgment for sufficient cause shown. 2. Applications to set aside sales on execution for irregularities are largely addressed to the discretion of the court, but that discretion should be exercised so as to secure the ends of justice, and, with a view to those ends, full weight will sometimes be given to technical irregularities. Allen v. Clarke, 36 Wis. 101. Opinion by COLE, J.—*Gride v. Dannenfelser, imp.*

MORTGAGE-FORECLOSURE—POWER OF SUPERVISORS.—1. Where a note and mortgage, given to secure an indebtedness to a county, ran in terms to the *supervisors* of such county and their successors in office, they may be declared upon as obligations to the county, and the misdescription of the obligee will not vitiate them. 2. An action upon such instruments as obligations due the county may be brought in the name of the board of supervisors. Bullwinkle v. Guttenberg, 17 Wis. 548; Cairns v. O'Bleness, 40 Id. 469. 3. Notes and mortgages, given by a defaulting county treasurer to secure payment of the amount due from him to the county, *held* valid as voluntary obligations taken as additional security for the indebtedness; the question whether the county board had any power to compound its claim against the treasurer, or to release in whole or in part the right of action upon his official bond, not being presented by the pleadings. 4. *Two* mortgages of undivided interests in the same land, executed by the same persons at the same time, to secure the same debt, may be foreclosed in the same action. Opinion by COLE, J.—*Supervisors of Oconto County v. Hall, imp.*

ACCOUNTING—WAIVER OF IRREGULARITIES.—In an action for an accounting, the matters constituting the plaintiff's claim upon his part were fully set forth in the complaint, and not denied; the cause was referred for the taking of testimony and statement of account by a referee, to be reported to the court; no objection was taken before the referee to the manner in which the accounts of the parties were rendered to him; he examined the parties personally in reference to such accounts, and their various dealings with each other to which the same related; and the circuit court reviewed the referee's report, examined the testimony, and made a finding in which the accounting was fully restated. *Held*, that under these circumstances there was no error in the court's refusal to again refer the cause for irregularity in the first statement of the accounts, or for a failure of the plaintiff to comply with Equity Rule 71, which requires parties accounting before a commissioner to bring in their respective accounts in the form of debtor and creditor, etc. Opinion by COLE, J.—*Richardson v. Single.*

LIABILITY OF ESTATE OF DECEASED JOINT OBLIGOR.—Where one of several joint obligors (in this case partners liable on a firm note) dies, the *legal* remedy is against the survivors only, and the estate of the deceased is discharged at law; though his administrator may be proceeded against in equity upon showing that the remedy against the survivors has been exhausted, or that they are insolvent. But where, during the pendency of an action against alleged partners upon an alleged obligation of the firm, one of the defendants died, and his administrators asked and obtained leave to defend, filed a separate answer, and litigated the cause upon the merits; *held*, that this was a waiver of all objections to the plaintiff's right to proceed against the estate *at law* instead of in equity; though, in order to recover against the administrators, plaintiffs must allege (by supplementary complaint), and must prove, that the surviving obligor is insolvent. Opinion by COLE, J.—*Sherman v. Kreul et al., imp.*